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CASES DETERMINED

IN THE

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OF

WISCONSIN

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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IN MEMORIAM.

GEORGE H. NOYES.

On the 12th day of September, 1916, Mr. Frank M. Hoyt of Milwaukee addressed the court:

May it please the Court:—The committee appointed by the Milwaukee Bar Association herewith present to the court the following memorial of the life and services of the late Judge GEORGE H. NOYES:

Memorial of the Milwaukee Bar Association.

Judge GEORGE H. NOYES was born in McLean, Tompkins county, New York, on April 18, 1849. His ancestor, James Noyes, the founder of the family in this country, was educated at Oxford University, entered the ministry, was an exile in Holland on account of his liberal views, and came to America in 1634, settling at Newbury, Connecticut. His descendants, ancestors of Judge NOYES, served in the Colonial wars and in the War of the Revolution. The boyhood days of Judge NOYES were passed at Delafield, Waukesha county, Wisconsin, where his parents settled on their arrival in the state in 1835. There he attended the De Koven school and afterwards the public schools. In the fall of 1866 he entered the freshman class of Lawrence University at Appleton, and in the fall of 1867 entered the University of Wisconsin, taking the classical course, from which he graduated with honors in 1873. During these years he was wholly dependent upon his own resources for his support and college expenses. To secure sufficient means to continue his education he acted as private tutor and as assistant librarian at the University, spent his winters in teaching and his summer vacations in manual labor. Graduating from the law school of the University of Wisconsin in 1874, he came to Milwaukee with ex-Chief Justice Dixon, and entered the office of Dixon, Hooker & Palmer. A year later the firm of Dixon, Hooker, Wegg & Noyes was formed,—Judge NOYES being the junior partner. The firm dissolved when Mr. Hooker became general counsel of the Northwestern Mutual Life Insurance Company. Judge NOYES continued in partnership with Judge Dixon until 1880, when the latter's health failed and he left Milwaukee for Denver. Judge NOYES then became a partner of Mr. George C. Markham under the firm name of Markham & Noyes. In 1888 he was elected judge of the then newly created superior court of Milwaukee county, and held that office until March, 1890, when he resigned and resumed the practice of the law with the surviving members of the old, established firm of Finches, Lynde & Miller,—reorganized under the name of Miller, Noyes & Miller. In January, 1906, he retired from the firm to become the gen-

eral counsel of the Northwestern Mutual Life Insurance Company, an office which he held until his death, which occurred on January 9, 1916.

He was married to Agnes Allis Haskell, a graduate of the University of Wisconsin, class of 1876, and is survived by her and their five children. He was a devoted husband and father, giving to each of his children a college education and the advantages of travel in this country and abroad.

For a number of years he delivered special lectures on the subject of "Common Carriers" to the students of the law department of the University of Wisconsin. The degree of LL. D. was conferred upon him by the University in 1904.

Judge NOYES did not confine his efforts exclusively to the practice of his profession. He was keenly interested in educational and charitable work and in other matters of public interest, contributing thereto liberally both in work and money. Among his many services to the public are the following: He acted for twelve years as a member of the Board of Regents of the University of Wisconsin, being president of the board for two years. He was one of the founders of the Associated Charities of Milwaukee, wrote its constitution, and was of very great assistance in its work. He served for several years as a trustee of the Milwaukee Emergency Hospital. He acted as chairman of the Harbor Improvement Committee of the city of Milwaukee, and to his efforts, in a very great measure, is due the successful development of the Lake Shore drive and the adjoining parkway system of the city.

This brief recital of the life and career of Judge NOYES is in itself the highest testimonial as to his character. It evidences his sterling qualities, inherited from a race of sturdy ancestors, his courage and strength of will, his successful struggle against adverse circumstances, his superior scholarly attainments, his great legal learning and skill, his professional success, his high conception and faithful performance of his duties as judge, lawyer, and citizen, his perfect integrity, and the esteem in which he was held by his fellow men.

Judge NOYES possessed a wide and accurate knowledge of the law. He was most industrious and conscientious in the preparation of his cases, and in trial work he was very effective with both court and jury, because he won their confidence by his perfect fairness and held their attention by the clean, simple, and logical manner in which he presented the facts and the law of his case.

Beginning in 1874, the year of his admission to the bar, and thereafter during the many years that he was engaged in active practice, he appeared in this court as attorney or of counsel in a very large number of cases, many of great importance, and the records of the court afford convincing proof of the fact that he was an able and successful lawyer.

George H. Noyes.

Judge NOYES, while at all times dignified and somewhat reserved in manner, was a man of most gentle and kindly nature and of a singularly pure character. In speech and action he seemed ever to bear in mind the words of Solomon, "Keep thy heart with diligence, for out of it are the issues of life." He always had the respect as well as the affection of his many friends.

The high regard which his associates had for him is shown by the tributes to his memory:

The Board of Regents of the University, in a resolution referring to his years of service as regent, say: "For his generous and devoted work on this board, Wisconsin owes him a debt of gratitude." The resolution adopted by the executive committee of the Northwestern Mutual Life Insurance Company states: "As an advisor, Judge NOYES was conscientious, painstaking, and able; as a counselor, courteous, considerate, and just. His death has brought to the members of this committee a deep sorrow and to the company a distinct loss."

The "Field Notes," the company's agency paper, in announcing his death said of him: "Although actuated by impulses of laudable ambition, he labored diligently with modesty, seeking not applause, but ever anxious for achievement. Putting himself always under the selectest influences, he worked out carefully and consistently a habit of mind and form of expression which revealed themselves in strength of logic and simplicity of statement."

By the death of Judge NOYES the courts of this state have been deprived of one of their most capable advisors and the bar has lost one of its most distinguished and useful members.

This committee respectfully ask that this memorial be spread upon the records of the court.

FRANK M. HOYT.
GEO. P. MILLER.
F. A. GEIGER.
GEO. C. MARKHAM.

Mr. Geo. P. Miller of Milwaukee also spoke in eulogy of Judge NOYES, but no record of his remarks has been preserved.

On behalf of the court Mr. Chief Justice WINSLOW responded as follows:

Judge NOYES was not only a lawyer who for many years stood in the first rank of the profession, but he was an eminent citizen as well. His early death brought to an untimely close an honorable and conspicuously successful professional career; successful not merely as the world views and judges of success, but successful in that it was a career which sounded a high note from beginning to end.

From the time when, as a poor boy, he won his education in a hand-to-hand conflict with poverty, to the time when he became the trusted counselor of one of the very greatest (if not the greatest)

financial and business institutions in the state, his life was known of all men, and it was recognized as a life based upon high ideals, a life which carried into practical application the fundamental principles of good citizenship.

His abilities were solid and enduring rather than ostentatious or spectacular, his successes the result of labor rather than sudden inspiration. In addition to intellectual powers of a very high order he had the genius of hard and continuous work, and he reaped the success which attends such work. His mind was clear and analytical, his reasoning powers forceful and compelling. In making an argument or brief he proceeded from premise to conclusion with an accuracy and convincing power which is the exclusive characteristic of a philosophical and comprehensive mind.

The death of so valuable a citizen and so accomplished a lawyer is sad enough, but there are very many of us who will realize that we have lost a cherished friend.

It has been said that a gentleman is a gentleman the world over, and that all that is necessary to make a gentleman is that he be honest and brave and kind. All these Judge NOYES was and much more. His courtesy to all with whom he came in contact, whether of high or low degree, was spontaneous and unfailing. The circle of friends who will mourn his death is very large.

The rush of modern life will only permit us to stop for a brief moment to pay tribute to him who has finished his course with honor. Indeed the ranks have already closed up and the forward march has been resumed. There is no time for mourning, but there is time to make up the record of an eminently admirable life and leave that record for the inspiration of them that follow.

HENRY CHAPMAN BAKER.

On the 16th day of January, 1917, Mr. William R. Kirk of Hudson presented the following

Memorial of the Bar of St. Croix County.

May it please the Court:—The undersigned committee, appointed by the St. Croix County Bar Association for that purpose, present for record in this court a brief memorial of the life of the late HENRY CHAPMAN BAKER.

HENRY CHAPMAN BAKER was born at Stafford, Genesee county, New York, on November 16, 1831, and died at Hudson, Wisconsin, December 27, 1914, in his eighty-fourth year.

He came of Revolutionary stock. His great-grandfather, Remember Baker, a brother-in-law of Ethan Allen, was one of the first to die in the cause of American independence. Only recently the state of Vermont erected a monument to the memory of Remember Baker.

Henry Chapman Baker.

Luther A. and Mercy Stannard Baker, the parents of Mr. BAKER, were pioneer settlers of Western New York. They came to that region when it was still a wilderness, and it was there that Mr. BAKER laid the foundation for his future career. The experiences of his youth were similar to those of a great number who have helped to make this country famous. There was plenty of hard work and meager school facilities. Through exceptional perseverance and industry, however, he obtained a year at a local seminary and later, in 1854, graduated from the New York Normal College at Albany. After teaching school for a short time he turned his attention to the study of law and was admitted to the bar in the state of New York in 1858. After practicing a short time at Batavia in his native state, like many other enterprising young men of his time he was attracted to the great Northwest, which was then just coming into prominence as a region of unusual possibilities.

In 1859 he removed to Hudson, Wisconsin, then the center of activity in connection with the construction of the St. Croix & Lake Superior Railroad. Soon after settling in Hudson Mr. BAKER became attorney for this corporation, which held valuable grants of land from the United States government, and for many years thereafter his time and attention was largely employed in serving this and successive companies.

In September, 1870, Mr. BAKER formed a partnership for the practice of law with Colonel John C. Spooner, afterwards United States Senator for Wisconsin, the partnership continuing for ten years.

These were history-making times for Northwestern Wisconsin. During these years the firm of Baker & Spooner brought to successful issue the fight to preserve to the state the early land grants, which were to become a prime factor in developing this portion of Wisconsin. During the latter part of this period Mr. BAKER was solicitor for the North Wisconsin Railroad and Mr. Spooner was solicitor for the West Wisconsin. When these two railroads were consolidated Mr. Spooner became solicitor for the new company, the Chicago, St. Paul, Minneapolis & Omaha, and the partnership was dissolved, Mr. BAKER retaining the very large general practice.

It would be impossible to recount in a limited space the many public and private activities that have engaged Mr. BAKER'S attention during his long and varied life. He was successively the head of the law firms of Baker & Clough, Baker & Spooner, Baker & Smith, Baker & Helms, and Baker & Haven. Judge Clough later became judge of the Superior circuit, serving sixteen years on the bench. Colonel Spooner, in addition to serving in the United States Senate as above stated, has since his retirement from that office attained eminence in the legal profession in New York city. Judge Helms retired from the partnership with Mr. BAKER to serve on the bench of the Eighth judicial circuit of this state, which position he occupied sev-

enteen years. The last-named firm existed for nearly fifteen years, being dissolved in 1911 upon Mr. BAKER's retirement from active practice.

At the time of his death he was the president of the St. Croix Bar Association, and had been in the active practice of law in Hudson for over fifty years, from 1859 to April, 1911, during which time he attained a high rank in his profession and maintained the same up to his retirement from active practice. For forty years he was easily one of the leading lawyers of the state. A most careful practitioner, he was recognized as one of the best draftsmen of pleadings in the profession. His legal documents were models of professional rhetoric and English.

Mr. BAKER possessed a mental equipment of unusual power. He had not only fine native ability, but a mind disciplined by much study and reflection. He was able to bring to bear upon legal and other questions a strength of reasoning and a fund of experience not often met with in any profession. He was unusually active and forceful in his mental operations and united these qualities with a very ardent temperament. This combination sometimes caused him to be misunderstood, but his mature and ultimate conclusions uniformly evidenced rare wisdom and discernment.

In his private life Mr. BAKER stood for the highest ideals in citizenship and morality. He was uncompromising with what he believed to be wrong and entirely unregardful of the effect that his views or acts might have upon his social or financial interests. He took a great interest in the upbuilding of the community and contributed a large share of effort to bring about a better moral and intellectual atmosphere in the city which he so long inhabited. He stood for the best and highest advanced thought of the Presbyterian church and was active in its support.

Mr. BAKER was always of a literary turn of mind and during his whole life he bought and read the best books. His private library was one of the best in this part of the country and was selected with great discrimination. Volumes of history, biography, philosophy, and religion were his daily companions, and he was as interested in the world's movements at eighty as he could have been at forty. A mind such as he possessed never grows old.

Mr. BAKER was married on September 11, 1860, to Ellen M. Brewster, of LeRoy, New York, a daughter of Judge Henry Brewster and direct descendant of "Elder" Brewster of Mayflower memory. Mrs. Baker, who survives him, is a woman of rare worth and exceptional poise and accomplishments, and theirs has always been a home of the highest and best ideals.

SPENCER HAVEN,
W. F. MCNALLY,
N. O. VARNUM,
Committee.

Mr. Justice SIEBECKER responded on behalf of the court:

The memorial just presented shows that Mr. BAKER in his youth had the experiences incident to the early settlement of Western New York state, which undoubtedly contributed much to prepare him to meet the hardships and trials, in his manhood, incident to the pioneer days of Wisconsin. His residence in this state embraced epochs of remarkable interest and significance in the history of the settlement of the Mississippi Valley. At the time he came to Wisconsin the great transformation of this vast territory from a wilderness to a densely settled region had just begun. He was a part of the development which filled this state with the first homes of an intelligent and industrious people. His life also embraced the period of the growth of the arts of industry and commerce throughout this state. Spending his active life in the midst of these conditions, his career was naturally characterized by the strong and sterling qualities of the pioneer who took an active part in these stirring events.

His professional career presents to us a picture of the people in possession of a new territory without the established institutions to protect them in the orderly pursuit of their personal and community affairs, and the beginning of a government in Wisconsin and the enforcement of law for the protection of life and property. We can readily think of him as one of the army of pioneers who contributed his ability as a lawyer to build up the institutions in this formative period of our history. His associates and co-workers found in him the qualities of a good citizen and the accomplishments of a well trained lawyer.

His personal career characterizes him as a man of high ideals and faithfully devoted to those principles which he believed must govern the lawyer in an honorable discharge of his professional obligations. In personal intercourse he did not appear to seek display and manifested the characteristics of a retiring and reflecting nature. His friends and acquaintances bear testimony to his love of culture and an abiding interest in the deep problems of life. Mr. BAKER always labored for the success of what he deemed best for the private and public interests and kept up an active participation in the affairs of life to the close of his career. The fruits of this life, as lawyer, citizen, and a devoted builder of a good home, are his enduring contributions in the service of a higher and truer manhood.

We feel a gratifying assurance in the thought that those who knew Mr. BAKER as a neighbor and friend think of him as a staunch worker among the pioneers to promote the best interests of his community, and remember him as a good citizen, who dedicated his talents and his calm and thoughtful efforts to strengthen the manhood and womanhood of this state.

EUGENE W. HELMS.

Mr. Kirk then presented the following

Memorial of the Bar of St. Croix County.

May it please the Court:—The undersigned committee, appointed by the St. Croix County Bar Association for that purpose, herewith presents for record in this court a brief memorial on the life of the late EUGENE W. HELMS, who died at Hudson, Wisconsin, on the 5th day of June, 1916.

Judge HELMS was a native of Wisconsin, having been born at Salem, Kenosha county, April 2, 1859. He was a son of Ira P. and Hannah (Cornell) Helms, both of whom were natives of New York state. He completed his education in the University of Wisconsin and graduated from the college of law in the spring of 1884, when he entered upon the practice of law at Madison with Mr. T. C. Richmond. In the fall of that year he formed a law partnership at Madison with the late I. C. Sloan, which continued until May, 1888. He then removed to Hudson, where he formed a partnership with the late Henry C. Baker. This partnership continued until he was elected judge of the Eighth judicial circuit in the spring of 1896. He was re-elected in 1902 and again re-elected in 1908. Owing to failing health he resigned from this office on the 1st of January, 1914, having served in all seventeen years on the bench. After retiring from the bench and feeling that his health was somewhat improved, he formed a law partnership with Lynn H. Ashley at Hudson. This firm was in existence at the time of his death.

On October 18, 1888, he was married to Mary Butler, who, with his mother and one daughter, Mrs. Herbert Anderson of Stillwater, Minnesota, survive him.

In the prime of life Judge HELMS was called from his earthly labors, but in his passing he left behind him a clean and enviable record as a man, a lawyer, and a judge.

As a man he was a progressive citizen and always took a deep interest in questions pertaining to social and community welfare. He was not a man of many words in his discussions of public questions, but when he spoke he showed that his ideas were the result of careful and studious thought. His words were persuasive and carried conviction. He had a broad and deep insight into the problems of life and the characteristic traits of humanity. This is most aptly illustrated by a perusal of the little book written by him just before his death, entitled "Reflections of a Cornfield Philosopher." No one can read the pointed and epigrammatic paragraphs of this book without feeling that the peculiar problems of this life were known to the writer.

As a lawyer he was studious and careful, loyal to his client, honest and upright in his presentation of cases to courts and juries, and fair

Eugene W. Helms.

to his opponent. His studious and painstaking care in analyzing problems and questions placed before him for solution, his thorough preparation for the trial of cases, and his masterful presentation of cases in the court room soon won for him an enviable reputation as a lawyer. For this reason the late Henry C. Baker of Hudson, a former law partner of Hon. John C. Spooner, sought out Mr. HELMS as a partner to aid him in taking care of the large law practice he then had. After removing to Hudson in 1888 these same qualities soon pointed him out as worthy of being elevated to the bench, and caused his election as circuit judge when he had resided within the circuit only eight years.

As a judge he undoubtedly performed his greatest service. He was peculiarly fitted to fill this important office. He knew humanity, was well grounded in the law, was an industrious student, and was fearless, honorable, and upright. In administering the duties of his office, both in the trial of cases and in considering those taken under advisement, he was exceedingly cautious in his efforts to find out what the law required him to do, and then to act according to his convictions without fear or favor. It was his constant aim to weigh facts so as to determine the truth of all controversies left with him for decision, and then to apply the law thereto as he understood it. In the discharge of these duties it can hardly be said that he was quick in arriving at his conclusions. In fact, all of his decisions were the result of hard work and careful study. He made his work hard for himself, but when it was finished it embodied all the convictions of an honest mind. His one fault, if fault it be, was that he gave so much of himself to the discharge of his duties that in all human probability he taxed his strength to the breaking point and thereby terminated his career at a time when he should have been able to look forward to years of future usefulness. Notwithstanding this, however, his work was not in vain. His unfailing fidelity to his trust helped to build up and establish in the minds and hearts of the people that confidence and faith in the integrity of our courts of justice which will reflect itself in our citizenship for years to come.

In the death of Judge HELMS his family, his home community, the Eighth judicial circuit, and the state have each suffered a great loss. On the other hand, society has gained much because he lived. His life was an example of truth, fidelity, loyalty, honor, and good citizenship that will live in the hearts of those who knew him for years to come. His friends included all of his acquaintances, and by them his memory will be cherished with an affectionate regard, which is his reward for living a good and useful life. May his life's work and the life he lived inspire us all to do as well as we can whatever is set for us to do.

SPENCER HAVEN,
W. F. MCNALLY,
N. O. VARNUM,
Committee.

Mr. Justice SIEBECKER responded:

It was my privilege to personally know Mr. HELMS in the years of his professional life during his residence in the city of Madison. Whoever came in contact with him was impressed with the strength of his personality and the genial and courteous qualities of his manners. He had the attributes of self-reliance, patience, and kindliness combined with the power that came from self-respect and pride of character. He exemplified the truth of the adage "As a man thinketh, so is he." There was no show nor pretense in his nature and the love of truth and righteousness abounded in his heart. The force of his character impelled him to do what he thought and felt was best and linked him in fellowship with friends and neighbors in the cause of the betterment of private and public affairs. His upright manner and wide-embracing interests attracted others and bestowed a confidence which enabled him to exert a wide influence and power among men for co-operation in community and public affairs. While I cannot speak with the same knowledge of Mr. HELMS as can those who were his friends and neighbors after his removal from Madison, I feel that everything set forth in the memorial of his life and labor among them is the natural fruit of a character and personality as we knew him at the threshold of his career. His intuitive perception of what was right and the knowledge he acquired from study and experience qualified him by nature and training to discharge the important and high function of circuit judge. His firm faith that "whatsoever things are true, honest, just, and of good report" would promote the highest needs of man, and his conscientious adherence to a course of life in harmony with these things, made him a helper and benefactor among men. Guided by such aspirations and beliefs, he was well equipped to discharge his judicial duties and do substantial justice in the strife and conflicts that arose in his court. His earnestness, industry, and learning enhanced his practical life work and constitute a legacy which adorns his memory as lawyer, judge, and citizen. His common sense and sturdy honesty contributed much to help maintain the tradition and good repute of the bench and bar of the state. Though not a man of genius, Judge HELMS possessed the attributes and convictions and displayed a willingness to devote himself to such service which made his talents most valuable to the world. I can fully appreciate the admiration and good will of the members of the bar expressed through their memorial. This, no doubt, was much enhanced through his pleasant, candid, and upright intercourse with them.

We unite with the members of the bar in admiration of his excellent qualities and in their esteem of his fidelity to the trusts the

people reposed in him as a man and as a judge. His private life was enriched by broad and generous impulses, and found its expression in kindness and tolerance toward others. He was simple, courteous, and upright. His life and career are the fruits of noble virtues, and they are his highest eulogy.

WILLIAM RUGER.

Mr. Alexander E. Matheson of Janesville presented the following

Memorial of the Rock County Bar.

May it please the Court:—WILLIAM RUGER, one of the most respected of Janesville citizens, died at his home on South Bluff street in this city on Monday, April 3, 1916, about 4 o'clock in the afternoon. He had been ill for many weeks, although he had heroically continued to work at his home until a short time before his death. His last days were days of much suffering, and death came as a relief to the tired and worn body.

Mr. RUGER was born in Bridgewater, New York, February 11, 1836. As a boy he came with his family to Janesville in 1844, since which time he was continuously a citizen of Janesville, and a constant resident, except for the period spent by him in the service of his country in the Civil War.

His father was Rev. Thomas J. Ruger, a clergyman of the Protestant Episcopal church, who established a mission of that church in Janesville upon his arrival in 1844, and who became the first rector after the parish was organized.

WILLIAM RUGER married Marion Roessle at Albany, New York, October 18, 1866. He left surviving him the widow, two daughters, and two sons,—Mrs. Marion Norcross, of Highland Park, Illinois; Mrs. Alice Sale, of Janesville; William Ruger, Jr., of Milwaukee; and Howard Ruger, of Baraboo, Wisconsin. A few weeks after his death the widow passed away, leaving the daughters and sons named as the survivors of the family.

At the outbreak of the War of the Rebellion WILLIAM RUGER and his brother Edward raised a company of volunteers at Janesville, first known as the "Ruger Guards," and afterwards as Company A of the 13th Regiment, Wisconsin Volunteers. Upon the formation of the regiment the deceased was commissioned first lieutenant and adjutant. After serving something more than a year he was commissioned by President Lincoln as assistant adjutant general of United States Volunteers with the rank of captain. He was wounded at the battle of New Hope Church in Georgia and soon after was brevetted major for gallant service at that battle and at the battle of Resaca,

Georgia. He was mustered out in November, 1865, when he returned to Janesville to continue the practice of the law.

Our deceased brother at the bar, in addition to the many minor interests which enlist the services and time of many good men, had three main interests in life: one was his chosen profession, another the church, and another his home and family.

He was a leader and official in Christ Church of the Protestant Episcopal faith in the city of Janesville and a constant attendant upon its services. Through this church he, as a Christian gentleman, expressed his beliefs and offered his devotions. In this church, its history, its services, its promises, and its abundant life he found consolation and uplifting strength all his days.

In his home, among the members of his family, Mr. RUGER was at his best. He was very kindly and considerate, a companion to his sons and daughters. To those who were favored with his hospitality he was a most delightful and gracious host. He had the bearing of one who was well born and who had been trained to appreciate many of the finest and best things in life, particularly those which related to domestic and social life in his own home.

He was admitted to the bar in 1859. With the exception of the time spent in the Civil War, he continued to practice until the hand of death was laid upon him, making a record of continuous service in the legal profession exceeding half a century.

He was one of the generation that made the Janesville bar famous throughout this part of the country. He not only had breadth of knowledge, but likewise profound learning and a deep understanding of legal principles. Where a superficial lawyer looked for cases to sustain a particular point, without an appreciation of the principles involved, Mr. RUGER studied cases that he might trace through them legal principles rooted in the common law and adapted to the needs of the new, changing, and more complex civilization. He was in every sense a great lawyer. He enjoyed a wide and favorable reputation and a large and lucrative practice.

He was a type of the old-time lawyer who is rapidly passing from us. As these veterans of the bar go out of professional life, either into retirement or into the Great Beyond, there are few, if any, schooled as they were to take their places. Modern conditions, the training to which young attorneys are now subjected, and the demands upon professional life are such that the modern lawyer is not like the lawyer that did the legal business of our forefathers. We are not saying now which type is to be preferred. We make no attempt to compare one with the other. Our purpose is to emphasize the fact that the older type is passing away and that his place is being occupied by an entirely different kind of lawyer.

He for years served as counsel for the Chicago & Northwestern

Railway Company. He tried many railroad cases at a time when the courts were marking new paths in the field of railroad law.

He was also a profound student and a recognized authority in the law relating to waters and water powers. His brother Edward was an hydraulic engineer, and the two were often drawn together in important investigations and litigation relating to hydraulics and water powers. The attorney RUGER acted in some very large and important cases of this nature, and often gave counsel and rendered opinions where large interests were affected but which were not involved in litigation.

It may be said that Mr. RUGER was one of our most able and most eminent members of the bar. His record as a lawyer will be found permanently imbedded in the Reports of our Supreme Court and in the records of our circuit courts in different parts of the state; also in the federal courts in this and other states.

He appeared as attorney or of counsel in a long list of cases found in the Reports of our Supreme Court, commencing with volume 21 and ending with volume 162; or, to put it in another way, extending from 1867 to 1916, a period of forty-nine years. Of all these cases about one half were affirmed where he represented the respondent or reversed where he represented the appellant.

He was a man of spotless integrity, fine training, and exalted character. He typified in an exemplary manner the lawyers of a former generation, to whom reference has been made. They who are younger should study this type that they may learn from their example and catch inspiration from their lives.

He did not relax much in his business and professional contact with men. He was a constant and diligent worker. He followed his daily schedule persistently and without much variation. He devoted himself assiduously to the law during the working hours of the day, and he did not permit himself to be led aside.

As a citizen Mr. RUGER was not active much in political life or in community or public affairs of any kind. He was once a candidate for the high position of justice of the Supreme Court, a position which he would have filled with fine dignity and great ability had he been elected. Nothing smaller seemed to tempt him from his domestic joys, his devotion to his church, and the assiduous practice of his profession. He was not often seen in public gatherings. In his later years at least he apparently did not seek relaxation outside of his own home. He no doubt was greatly interested in public movements and was ready to contribute his money and counsel, but his interest was not often manifested by open activity.

For one who has lived and wrought as WILLIAM RUGER did, his associates may well inscribe "success" above his name. His family, relatives, and closest friends have the satisfaction of knowing that he

leaders of the profession. Had he remained in active practice he would have attained a reputation as one of the great trial lawyers of the state.

Judge SALE dispensed a personal charity without ostentation but with discriminating generosity. Many a poor but deserving man and woman of Rock county has felt in the death of Judge SALE the loss of a helping hand.

Judge SALE was a man of the highest ideals in all the affairs of life. His ideals of honesty, integrity, and morality were with him real facts to be practically applied and not mere preacher's precepts. To a much larger degree than is usual with the common run of men did he apply these ideals to his own every-day affairs, and, not only that, it was his constant aim to induce others to live up to those ideals also. Nothing irritated Judge SALE more than an unworthy act. He was a good citizen, always ready to give his assistance to any movement looking to the improvement of the city or the promotion of the welfare of its citizens. He was public spirited and had great civic pride. In his death was lost a man who would well have served in any community as an ideal example of a true citizen.

He was engaged in the discharge of the duties of his office up to within a few days before his death. The announcement of his death cast a gloom over the whole county, and few there were who did not feel they had suffered a personal loss.

Well may it be said of him in the words of the poet:

"None knew him but to love him,
None named him but to praise."

GEO. G. SUTHERLAND,
M. O. MOUAT,
J. C. ROOD,
E. D. MCGOWAN,
C. E. PIERCE,
Committee of the Rock County Bar Association.

JOHN CUNNINGHAM.

Mr. O. A. Oestreich of Janesville presented the following

Memorial of the Rock County Bar.

On the morning of the 17th of last July the news that JOHN CUNNINGHAM had been stricken and was not expected to recover came as a sudden shock to all who knew him. He was in the prime of life and had been in the best of health until this sudden stroke. What at first seemed but a slight attack soon became fatal, and he died on July 18, 1916.

Mr. CUNNINGHAM was born in the city of Janesville on June 17,

John Cunningham.

1862. He was the oldest of a family of six children born to John and Mary Cunningham. When he was about seven years of age his parents moved to a small farm north of the city. He was the son of poor parents, who were unable to come to his financial assistance to get an education. His boyhood life was like that of any country boy of those days in this new country. Every member must help so that the family may live. He supplemented such schooling as the district school of that day afforded with reading and study of his own. He never attended a high school. By individual effort he prepared himself for college. In 1880 he entered Milton College and was graduated in June, 1885. During part of these years he boarded himself. Through the summer and part of the school year even, he rented and worked small pieces of land to earn the means to continue his education. In this way he earned enough money to help himself through college and more too, for he has been known to say that during the last year of his college course he even paid part of the expenses of his roommate. After his graduation from Milton College he studied law in the law offices of Winans & Hyzer in winter and earned money to live on in summer. He was admitted to the bar on the 2d of May, 1888, and actively practiced as a lawyer in the city of Janesville from that day until he died, prominent in his profession.

JOHN CUNNINGHAM was a splendid example of the men who, under our free institutions, by their own effort rise from lowly walks of life to honored positions.

JOHN CUNNINGHAM had the confidence of the entire community as a lawyer of ability and integrity. He desired and had the quiet practice of the office rather than that involving the contest of the forum. As occasion demanded, however, he tried his cases with skill and ability and was a dangerous antagonist. But as the wise counselor and sound adviser he was particularly strong and had a host of clients who intrusted important matters to him. And in all his professional relations Mr. CUNNINGHAM was absolutely honest. He formed a very clear decision as to what his client was entitled to, and when he had helped him to obtain that he considered his full duty as a lawyer done. He was not one of those who spend a lifetime trying to obscure the line between right and wrong, trying to prove that to be just which he knew to be unjust. He was rather one of those who spend their time in the search of what is right and true, who are determined to follow where the truth leads, and in that determination grow stronger day by day and constantly more valuable to their clients, because the power to discern the truth increases with the honest search for it. In all of those branches of the profession which promote the peace and substantial good of the people in the community, JOHN CUNNINGHAM stood prominent at the bar of Rock county. And without exaggeration can it be said that in his

death the bar of Rock county and this state has lost one of its best and ablest members and his community one of its prominent sons.

Mr. CUNNINGHAM had not only the respect but the love of all his fellow members of the profession. As a result of this, the Rock County Bar Association, in 1911, elected him as its president. He was the president of the Bar Association when he died. He was intensely interested in all public matters and was a thorough student of the governmental and economic affairs of his city, state, and nation. He was always identified with the best growth and development of his community, and when called gave of his labor generously to the public service.

In his home life Mr. CUNNINGHAM was fortunate and happy. On the 28th of November, 1888, he was married to his college classmate, May Boss, who, together with their two sons, Roger G. and Robert J., survive him. Roger, the elder, was associated with his father in the practice of the law at the time of his death. In his passing away the members of this family lost a kind and loving husband and father, who was at all times earnestly solicitous of their every comfort and welfare.

While we shall always think of JOHN CUNNINGHAM as the able lawyer and man of high integrity, it is for his genial and helpful companionship as a friend and neighbor that he will longest linger with us as a cherished memory. He practiced from day to day those small and gentle virtues which are practiced so little and which contribute so immeasurably to the happiness of others. Who of his friends will ever forget JOHN CUNNINGHAM, with his word of encouragement kindly spoken, his word of correction gently made, his friendly and sympathetic interest and helpfulness? To the younger members of the bar he gave more than generously of his time and attention when they called on him on occasions of need. Never once was he known to yield to that altogether too common fault of leaving many small and helpful deeds undone. He was the true friend of all within his circle of acquaintance, and we believe it can be truly said of him that among his acquaintances there was not one who did not like and love him. He was indeed a man without an enemy on earth. It was by the possession of these qualities that he had the noble crown of friendship, and long after his achievements of hand and mind shall have been forgotten will we continue to remember him for his never-failing courtesy, his helpfulness, his deeds of kindness, and his heart that beat with ours. His sprightly humor and genial disposition made him a welcome guest wherever his friends gathered socially, and many such a gathering will be less jolly because he can no longer be present.

Such a man was our departed friend of yesterday. It is hard to realize that this strong and vigorous man is with us no more; that

he who but a few days ago walked erect among his fellow men now lies still, motionless, and gone; but such is the way of life and we bow in submission to the Master's will.

THOMAS S. NOLAN,
W. H. DOUGHERTY,
O. A. OESTREICH,
Committee of the Rock County Bar.

Mr. Chief Justice WINSLOW responded:

The Bench fully appreciates the justice of the tributes so feelingly paid by the Rock county bar to the characters of their deceased brethren. I knew them well, both personally and professionally. Let me speak of Mr. RUGER first: He was one of the very last of our soldier-lawyers who, coming to the bar just before the outbreak of the Civil War, laid aside their law books and gave up thoughts of professional success to brave the dangers of the march, the midnight bivouac, and the shot-swept battlefield, not knowing whether they would ever return. They were men of forceful character, physically and mentally vigorous, and moved by high ideals. Some of them were intellectually pre-eminent and Mr. RUGER was certainly one of the first of these.

Returning from the battlefield they took part in the important litigation which attended the marvelous development of the great railroad systems and manufacturing industries which followed the war. It was a time when new and important questions were arising and when much of our modern law was in the making. Mr. RUGER's natural abilities were great, his education thorough, his mind markedly analytic and logical. Inevitably he took a leading place among the great lawyers of the state. He was intrusted with very important interests and had many great cases. His legal career was long, honorable, and useful. He brought honor to our great profession and his professional brethren do well to honor his memory.

I first met Judge SALE more than thirty years ago when he was still an active practitioner at the bar. I was at once impressed with the transparent honesty and fairness of the man. I think no one could look into that calm, kind face and make any mistake as to the character which lay behind it. It was fitting indeed that he should be chosen as judge of the probate court, and it was almost inevitable that he should be retained by the people in that important post as long as he would consent to serve. It would have been strange had it been otherwise. There is no judicial position which is closer to the people than the position of probate judge and there is none where there are greater opportunities for usefulness. One can well imagine with what fidelity and wisdom he administered the law and with

what sympathetic care he guarded the interests of the widow, the orphan, and the helpless. True, his work on that bench took him away from the active practice of his profession and undoubtedly prevented him from attaining that wider distinction at the bar which his abilities would have guaranteed to him, but it is quite certain that he could have done no greater or more valuable work in any other field. It may be said of him with truth, "He dealt justly, he loved mercy, he walked humbly with his God."

Both Mr. RUGER and Judge SALE had reached and passed the psalmist's span of life when they died, but Mr. CUNNINGHAM had barely passed middle age. I met him but a few months since, apparently in full health and vigor, and possessing all that kindliness of manner which as the memorial well says made every man his friend. One could not imagine that death was so near.

Mr. CUNNINGHAM entered the profession after I came to the bench and hence my professional knowledge of him was not so intimate as of his older brethren of whom I have spoken. As said in the memorial his chosen work was in the office; it consisted of wisely advising clients, keeping them out of litigation, and promoting the peaceable adjustment of difficulties rather than encouraging litigation. This is one of the greatest works that any lawyer can do. The lawyer who does it consistently and well frequently deserves a higher place in the ranks of the profession than one who had made the forum ring with his eloquence. JOHN CUNNINGHAM was an able lawyer, a highminded citizen, in every sense of the word a good man. We are all poorer because of his death, for we have all lost a friend and there is no greater loss than that.

The memorials are ordered to be made of record and published in the Reports.

CASES DETERMINED

AT THE

August Term, 1916.

PETITION OF ANDERSON.

September 22, 1916.

Supreme court: Original jurisdiction: When exercised: Insufficient time for decision: Certification of nominee for state office.

An action to determine whose name should, after a primary election, be certified by the secretary of state as the nominee of a party for a state office—in this case that of member of assembly—is within the original jurisdiction of the supreme court; but, in view of the statutory provisions for a recount of the votes, and because there would be an issue of fact which must be sent to the circuit court for trial, with no reasonable certainty that any result could be reached before the time when the secretary of state must act, leave to bring such an action is in this case denied.

PETITION for leave to bring an action in this court. *Denied.*

Crownhart & Wylie, for petitioner. [No brief on file.]

The decision in this case was announced September 22, and the following opinion was filed October 3, 1916:

PER CURIAM. *Douglas Anderson* petitions for leave to bring an equitable action in this court for the purpose of enjoining the secretary of state from certifying to the county clerks of Florence, Forest, and Oneida counties the name of A. M. Rogers as the Republican nominee for the assembly from that district, and directing him to certify the name of the petitioner for that office. The petition alleges, in sub-

stance, that by the returns to the state board of canvassers of the primary election held September 5, 1916, it appears that Rogers received 825 votes and the petitioner 824 votes for said nomination, while as matter of fact the election inspectors in two precincts made errors in the count and credited to said Rogers four votes more than he actually received in one precinct and one in another precinct, thus giving Rogers an apparent majority of one, while in fact the petitioner had a majority of four. The petition further alleges that the facts as to these errors were not discovered by him until after the county canvassers had finished the county canvass and the time for securing a recount had expired.

An assemblyman being a state officer, it is doubtless true that this case is within the original jurisdiction of this court and should be entertained if, in the sound discretion of the court, the exigency is sufficiently grave to call for the exercise of that jurisdiction. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; *State ex rel. Bancroft v. Frear,* 144 Wis. 79, 128 N. W. 1068.

Upon mature reflection, we do not think that the jurisdiction should be exercised.

The Primary Law, as amended by sec. 34, ch. 381, Laws 1915 (sec. 5.29, Stats. 1915), makes all the provisions of the Statutes relating to recount of ballots by the county board of canvassers applicable to primary elections. These provisions are found in sec. 6.66 of the Statutes, and they furnish a summary method by which any candidate may obtain on demand, at any time before the county canvass closes, a recount of the votes in any precinct. In view of this remedy furnished by the statute, and in view of the extreme shortness of the time within which final judgment must be rendered in the proposed action in order to be of any avail, it is not deemed that the original jurisdiction of this court should be exercised.

The secretary of state is required to certify the names of candidates to the county clerk not less than fourteen days before the election, *i. e.* on or before October 24th in the present

year. This petition was received September 21st. If an action were to be brought in this court, the complaint would have to be served, sufficient time given to answer, a trial had after fair opportunity to prepare the defense, and a final decision rendered after due hearing within about four weeks. It seems certain that there would be an issue of fact which would have to be sent to the circuit court for trial. Sec. 2408, Stats. It is quite manifest that there would be no certainty that any result could be reached before the time when action must be taken by the secretary of state; in fact there is an extreme probability that no result could be reached, even if the case were given the most rapid expedition consistent with due consideration of the questions at issue. If it appeared that the case could be decided upon an issue of law without the trial of any fact, the question would be different. Under the circumstances, we feel that the original jurisdiction should not be exercised in the present case. There should be a reasonable certainty that a result could be reached which would be effective in order to justify the use of the original jurisdiction. It is too great a power to be used hastily, or to accomplish an impotent result.

By the Court.—Motion denied without costs.

STATE EX REL. PLEHN, Appellant, vs. WIDULE, Respondent.

April 15—October 3, 1916.

Elections: Contests: Quo warranto: *Evidence: Competency: Uncompleted recount: Ballots: Tally sheets.*

1. A partial recount of ballots under sec. 86, Stats. 1913 (sec. 6.66, Stats. 1915), which was stopped by an order of court before it was completed, was not competent evidence, in a subsequent action of *quo warranto*, to impeach the determination of the board of county canvassers that the defendant was duly elected to a county office.

2. Where a statute (sec. 80, Stats. 1913; sec. 6.60, Stats. 1915) providing for the preservation and protection of ballots to be used in a contest has not been complied with, or where it appears that the integrity of the ballots has not been preserved, such ballots are not competent evidence to impeach the determination of the board of canvassers.

[3. Whether the tally sheets kept by the precinct election officers and returned to the county clerk pursuant to secs. 42*a*, 78, Stats. 1913 (secs. 6.28, 6.59, Stats. 1915), are competent evidence to impeach the determination of the board of canvassers, is not decided.]

Winslow, C. J., dissents.

Appeal from a judgment of the circuit court for Milwaukee county: Geo. W. Burnell, Judge. *Affirmed.*

This is an action of *quo warranto* brought by plaintiff against the defendant to determine the right of defendant to hold the office of county clerk of Milwaukee county, Wisconsin. The defendant was a candidate for re-election at the general November, 1914, election, held November 3, 1914, and the plaintiff and others were also candidates at said election for the same office. The board of county canvassers, proceeding according to law, determined that the defendant was duly elected and issued the certificate of election to him. In due time a recount in certain precincts was asked by the plaintiff under sec. 86, Stats. 1913, both plaintiff and defendant designating the precincts in which they desired a recount according to sec. 86.

During the recount and before completion thereof this court ordered that all recount proceedings under sec. 86, Stats. 1913, cease, and the canvassers were required by *mandamus* to make a statement of the votes cast for county officers, file the same with the county clerk, and publish the result, and that the county clerk issue certificates of election thereon as prescribed by secs. 83, 84, and 85, Stats. 1913. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 150 N. W. 542.

In compliance with the order of this court in the matter the recount ceased before completion. Afterwards, in attempted

compliance with sec. 86, Stats. 1913, the plaintiff appealed to the circuit court for Milwaukee county from the action of the board of canvassers, and the circuit judge issued an order directing the county clerk to transmit to the clerk of the court forthwith all ballots, papers, and records affecting such appeal, and fixing a time and place for hearing thereon in open court. Upon the hearing before the circuit court objection was made to the jurisdiction of the court upon the appeal, and after hearing and on January 14, 1915, the appeal was dismissed. In dismissing the appeal the circuit court referred to sub. 4 of sec. 86, Stats. 1913, which provides that "Nothing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office," as preserving remedies for the trial of title to office such as *quo warranto* or other proceeding, and provided in the order of dismissal "that all ballots, papers, records, and all petitions transmitted, left, or filed with the clerk of this court and which are now in his possession or under his control which have any reference whatever to, or are connected in any manner with, said subject matter of election, or recount, or appeal, be preserved and retained in the vaults of said clerk of court, and under seal. . . ."

Before the dismissal of appeal the present action was commenced January 4, 1915. The court below, after hearing the case, found that the defendant was the "duly certified, elected, qualified, and acting county clerk of Milwaukee county," and that the plaintiff's complaint should be dismissed.

It appears in the record that certain tally sheets and returns of inspectors were put in evidence on the trial below which showed that the tally sheet from the fourth precinct, Eighteenth ward, gave plaintiff nineteen votes, while the return of the inspectors certified only nine votes for that precinct.

Judgment was entered dismissing the complaint with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Lehr & Kiefer,* attorneys, and *J. Elmer Lehr* and *Edwin W. Knappe,* of counsel, and oral argument by *Mr. J. Elmer Lehr* and *Mr. Knappe.*

For the respondent there was a brief by *W. H. Timlin, Jr., Patrick W. Dean,* and *Emil Hersh,* and oral argument by *Mr. Timlin* and *Mr. Hersh.*

The following opinions were filed May 2, 1916:

Kerwin, J. The court below held that the evidence given, offered, and received in that court was insufficient in fact and incompetent in law to successfully impeach the determination of the board of county canvassers; and that the defendant is the duly certified, elected, qualified, and acting county clerk of Milwaukee county.

The appellant offered evidence tending to show the result of the recount so far as it had proceeded, and it is claimed by counsel for appellant that by correcting the returns to agree with such recount and without further proceeding with the recount it appears that plaintiff has the greatest number of the votes cast for county clerk at the November, 1914, general election. Conceding, without deciding, that when the recount stopped, the result up to that point showed that plaintiff had the greatest number of the votes cast for county clerk, the question arises whether a partial recount in the precincts designated in the application for recount was sufficient to impeach the determination of the board of county canvassers. In order to establish that the plaintiff was elected and overcome the determination of the board of county canvassers, it was necessary for the plaintiff to establish in some proper legal proceeding that the plaintiff was elected and the determination of the board erroneous.

The plaintiff was at liberty to pursue the remedy provided by statute for a recount and appeal from the determination of the board on such recount, or he might bring an action of *quo*

warranto to try title. He first chose the former remedy, and proceeded with the recount until it was stopped by the order of this court. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 150 N. W. 542. The precincts designated by the parties in the recount proceeding not having been completed, there was no determination by the board. The statutory remedy on recount not having been carried out to completion, there was no determination of the matter; hence the partial recount was not competent evidence in the present action. The determination of the board of county canvassers could be impeached by a recount only when the recount was conducted and completed in the manner provided by statute and showed that the determination of the board of canvassers was erroneous and that the plaintiff had received the greatest number of the votes cast for county clerk. The statute clearly provides how the recount shall be conducted and com pleted and provides, among other things, that on recount the ballots "in every precinct so specified" in the demand for recount shall be recounted. Sec. 86, Stats. 1913. A partial recount in the precincts demanded is not a compliance with the statute and no determination can be made thereon authorizing an appeal under the statute, sub. 3, sec. 86, Stats. 1913. The statute not having been complied with, the recount proceedings were not competent evidence to impeach the determination of the board of county canvassers. *Bradbury v. Wightman,* 232 Mo. 392, 134 S. W. 511.

Error is assigned on refusal of the court to allow the ballots to be counted on the request of plaintiff. Sec. 80, Stats. 1913, provides in part:

"Before separating, the inspectors shall fold in two folds and string closely upon a single piece of flexible wire, all ballots which shall have been counted by them, except those marked 'Objected to,' unite the ends of such wire in a firm knot, seal the knot in such manner that it cannot be untied without breaking the seal, inclose the ballots so strung in a secure canvas covering and securely tie and seal such canvas

covering with official wax impression seals, to be provided, by the inspectors in such manner that it cannot be opened without breaking the seals, and return said ballots, together with the package containing the ballots marked 'Defective or objected to' in such sealed canvas covering to the county clerk, and such officer shall carefully preserve said ballots for sixty days, and at the expiration of that time shall destroy them by burning without previously opening the package. . . . Provided, that if any contest of the election of any officer voted for at such election shall be pending at the expiration of said time, the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections the parties contesting the same shall have the right to have said ballots opened, and to have all errors of the inspectors in counting or refusing to count any ballot, corrected by the court or body trying such contest, but such ballots shall be opened only in open court or in open session of such body and in the presence of the officer having the custody thereof."

The evidence is overwhelming that this statute was not complied with in preserving the integrity of the ballots. The court below so held in a written opinion in the record, and held that the evidence was uncontradicted that one bag in which ballots were kept, when taken before the board of canvassers, was open.

There was direct evidence that the ballots had been tampered with before the trial of this action. It was established on the trial without dispute that at least one of the bags containing ballots, when taken before the board of canvassers on the alleged recount, was open, and was still open at the time of trial of this action. There was also other evidence strongly tending to show that in other respects the ballots had not been protected so as to preserve their integrity. Under such circumstances the court properly refused the plaintiff's request to recount the ballots.

It is well settled that where statutes providing for the preservation and protection of ballots to be used in a contest have not been complied with, or where it appears that the integrity of the ballots has not been preserved, such ballots are not competent evidence to impeach the determination of the board of

canvassers. *Farrell v. Larsen,* 26 Utah, 283, 73 Pac. 227; *People ex rel. Williams v. Cicott,* 16 Mich. 283; *Martin v. Miles,* 40 Neb. 135, 58 N. W. 732; *Fenton v. Scott,* 17 Oreg. 189, 20 Pac. 95; *Beall v. Albert,* 159 Ill. 127, 42 N. E. 166; *Thornhill v. Wear,* 131 La. 739, 60 South. 228; *DeLong v. Brown,* 113 Iowa, 370, 85 N. W. 624; *Edwards v. Logan,* 114 Ky. 312, 70 S. W. 852; *People v. McClellan,* 124 App. Div. 215, 108 N. Y. Supp. 765.

Whether the tally sheets were competent to impeach the return of the board of canvassers we need not and do not decide, because, even if the plaintiff be given credit for the discrepancies in his favor appearing from the tally sheets and return, the defendant would still have the greater number of votes.

We are convinced that the court below was right in holding that there was no proof sufficient to impeach the determination of the board of canvassers and in denying the request of plaintiff to count the ballots.

By the Court.—The judgment is affirmed.

WINSLOW, C. J. (*dissenting*). I do not agree with this decision and I want to state why.

It is not vastly important whether *Mr. Plehn* or *Mr. Widule* was elected county clerk so far as the performance of the duties of the office are concerned; probably one could perform them as well as the other; but it is vastly important that the man actually elected should be seated.

One of the basic principles on which our government is founded is the principle that the qualified candidate who receives the greatest number of votes is the only rightful officer, and whenever it appears that a minority candidate has been seated or that a court, when duly invoked, refuses to investigate the question, and leaves a grave doubt as to the actual incumbent's right to the office, respect for democratic government receives a serious shock. My strong impression is that one of these things has happened here.

Let us consider briefly the admitted facts: The county board of canvassers determined by the original canvass that the plaintiff received 19,891 votes and the defendant 19,918 votes, a difference of only 27 votes. This result was reached by simply compiling and adding together the returns from the precinct officers. Application for a recount of a considerable number of precincts pursuant to the provisions of sec. 86, Stats. 1913 (sec. 6.66, Stats. 1915), was made by the relator and similar applications were made by the defendant and by other candidates, and the canvassing board started to make the recount. The recount was stopped before its completion by the judgment of this court December 12, 1914, in the case of *State ex rel. Zabel v. Board of Canvassers,* 159 Wis. 249, 150 N. W. 554, but the board had already counted and tabulated the votes cast for county clerk in nine of the disputed precincts and had published the results of such recount in those precincts as appears by the official record of their proceedings. In these nine precincts the official recount thus made and finished showed a total of 1,593 votes cast for *Widule* as against 1,605 shown by the original canvass, and 862 votes cast for *Mr. Plehn* as against 856 shown by the original canvass. It appeared, therefore, that in these precincts the relator had made a net gain of 18 votes. This left a difference in favor of *Mr. Widule* of but 9 votes. It further appears without dispute that the official tally sheet kept by the election officers in the fourth precinct of the Eighteenth ward shows 19 votes cast for *Mr. Plehn,* while the written statement returned to the county clerk states that there were but 9; also that the tally sheet in the fifth precinct of the same ward showed 20 votes cast for *Mr. Plehn,* while the written statement states that there were 19.

These facts are all undisputed. If, therefore, the recount made by the county canvassers in the nine precincts is better evidence of the actual vote than the original county canvass, and if the tally sheets are better evidence than the written

statements of the precinct officers, it is established *prima facie* by this evidence that *Mr. Plehn* received two votes more than *Mr. Widule,* because the former gentleman has gained 17 votes and the latter gentleman has lost 12 votes, making a net gain for *Mr. Plehn* of 29 votes.

It is said that the recount is not good evidence because it never was completed. I am unable to appreciate the force of this argument. The law providing for the recount is a valid law. It emerged from the *Husting* and *Zabel* cases considerably disfigured but still a valid law. The canvassing board had acted in strict accordance with its provisions in recounting the votes in the nine precincts above referred to. So far as those precincts were concerned its labor was complete and the results recorded. The original ballots had been counted under the eyes of counsel for both contestants and probably of the contestants themselves. There is nothing in the evidence tending to impeach the correctness of the results, and they are official results reached under the provisions of a valid law. True, this court held that the recount must cease at this point because it concluded that the county and state canvasses must be completed within a certain limit of time, but this does not mean that the work already done was invalidated or deprived of its probative force. Why should that work not be given effect? I am unable to see. It seems to me that in ruling otherwise both the trial court and this court have subordinated form to substance, and rejected evidence which our common sense tells us is the very best evidence.

The decision in the *Husting Case* and the decision in this case taken together mean, as it seems to me, that in every case of a closely contested election in Milwaukee county sec. 86 of the Statutes becomes a mere husk without the kernel, a beautiful promise, kept to the ear but broken to the hope.

So with regard to the differences between the tally sheets kept by the precinct election officers and the statements of re-

sults returned by them to the county clerk under the provisions of secs. 77 and 78 of the Statutes of 1913 (secs. 6.58 and 6.59, Stats. 1915).

By the provisions of ch. 581, Laws 1913 (now sec. 6.28, Stats. 1915), the tally sheets are made official documents to be certified by the election officers and returned to the county clerk as part of their statement of the result under the provisions of sec. 78, Stats. 1913 (sec. 6.59, Stats. 1915). Thus they become evidence, and when fair on their face and not impeached by extrinsic evidence (as is the case here) must, it seems to me, be considered more satisfactory evidence of the actual vote than the written statement afterwards made. It would not be correct to say that they would necessarily control the written statement. There might well be evidence on the face of the tally sheet which would stamp it as unreliable or extrinsic evidence which would have the same effect, but there is nothing of that kind here. The tally sheets in question are not impeached in any way; they contain the tallies evidently placed upon them carefully and methodically by the election inspector or clerk as the names of the candidates were called off from the ballots as they were being counted. It is to be noted that in the tally sheets from the fourth precinct of the Eighteenth ward not only are the tallies themselves 19 in number, but the sum is carried out in a column to the right as 19, while in the written statement on a separate sheet the number is stated as 9. To my mind it is much more likely that an error was made in transferring the totals to the statement than in recording the votes on the tally sheet as they were called off.

What the conclusion of the trial judge on this question was seems somewhat uncertain. There is but one finding which touches the question at all and that is the finding that the evidence received was "insufficient in fact and incompetent in law" to impeach the return of the county canvassers. So far as the tally sheets are concerned there can be no doubt of their competency, and in my judgment there is as little doubt

of their sufficiency. McCrary, Elections (4th ed.) §§ 505, 506; *State ex rel. Att'y Gen. v. Donnewirth,* 21 Ohio St. 216.

I have not discussed the question as to the admissibility of the ballots themselves. While I entertain grave doubt whether the ruling of the court excluding them was correct, I should not on this ground alone disagree with my brethren, but defer to the conclusion of the trial judge, who evidently thought that they had lost their probative value because it appeared that they had not been carefully guarded and might easily have been tampered with. I base my conclusions on the uncontradicted evidence in the case, which in my judgment shows a plurality of two votes for *Mr. Plehn.* If this *prima facie* showing could be met and overcome in any way, it was the business of the defendant to present the evidence which would accomplish that result, but this he did not do.

ESCHWEILER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on October 3, 1916.

COTTER, Respondent, vs. JOINT SCHOOL DISTRICT No. 3 OF THE VILLAGE OF PLUM CITY AND THE TOWN OF UNION IN PIERCE COUNTY, WISCONSIN, and others, Appellants.

May 2—October 3, 1916.

Schools and school districts: Borrowing money: Statute construed: "Erection" of building: "Remodeling:" Validity of resolution of electors: Omission supplied by statute: Surplusage: Rate of interest.

1. Sec. 475, Stats. 1915,—providing that any school district may, by vote of the electors, authorize the borrowing of money for the purpose of aiding in the erection or purchasing of a schoolhouse,—should be liberally construed to effectuate its purpose.

2. The borrowing of $12,000 "for the purpose of remodeling" a schoolhouse "and erecting an addition thereto" was for the purpose of aiding in the "erection" thereof, within the meaning of sec. 475.
3. Where the electors of a school district adopted a resolution authorizing the district board to apply for a loan from the state trust funds or some other source, the failure to specify therein the manner of payment, as required by sec. 475, Stats. 1915, did not invalidate the resolution, such omission being supplied by secs. 258*a*—1 and 261, so as to leave no uncertainty.
4. The words "or some other source," in such resolution, may be treated as surplusage.
5. Such a resolution was not invalidated by the fact that it provided for an interest rate of four and one-half per cent., while the statute provides for only four per cent. on trust funds, since the lower rate is advantageous to the district.

Appeal from an order of the circuit court for Pierce county: George Thompson, Circuit Judge. *Reversed.*

Action by a taxpayer to enjoin a school district having an assessed valuation of $257,887 from making a loan of $12,000 pursuant to certain resolutions passed by the electors thereof. The statute under which the loan was sought to be made is sec. 475, Stats. 1915. So much thereof as is material to the questions raised by the appeal reads:

"For the purpose of aiding in the erection or purchasing of a schoolhouse any school district, whether organized under general law, special law or charter, may, by vote of the electors at any annual or special meeting, called for that purpose authorize the district board, school board or board of education to borrow money, to an amount which shall not in any way exceed the limitations now provided by general law. The resolution to be voted upon shall be in writing, specifying the amount to be borrowed, the rate of interest, and the time and manner of payment, which shall be in annual instalments, or otherwise, the last of which shall be payable in not exceeding fifteen years from the first day of February next ensuing."

The resolutions adopted by the electors of the school district were as follows:

"Resolved, that the school district board be and it is here-

by authorized to make application for a loan of twelve thousand dollars from the state trust funds, or some other source, payable in fifteen years, with interest at the rate of four and one-half per cent. per annum payable annually, for the purpose of remodeling the present school building and erecting an addition thereto."

"Resolved, that a sum sufficient to pay the interest and principal of the loan as it becomes due be and the same is hereby levied upon the taxable property of the district."

The complaint stated the proceedings had by the electors, together with other proper allegations, and the defendants demurred thereto on the ground that it failed to state a cause of action. From an order overruling the demurrer the defendants appealed.

Charles A. Ingram, for the appellants.

John E. Foley, for the respondent.

The following opinion was filed May 23, 1916:

VINJE, J. The plaintiff contends that these resolutions are insufficient to authorize any loan because (1) the statute does not authorize a loan for the purpose stated in the first resolution; (2) the resolution does not specify the time of payment; and (3) it does not specify the manner of payment, whether in annual instalments or otherwise.

It is urged that since the statute permits a loan only for the purpose of aiding in the erection or purchase of a schoolhouse, money cannot be borrowed for the purpose of remodeling a schoolhouse and building an addition thereto; that the remodeling of a building is not equivalent to an erection thereof. We think such a construction is too narrow. The statute was intended to enable school districts that did not have adequate schoolhouses to obtain them by purchase or erection, and it should receive a liberal construction to effectuate that purpose. The remodeling of a building is more than repairing it or making minor changes therein. The ordinary significance of the term imports a change in the re-

modeled building practically equivalent to a new one. When it is supplemented by the building of an addition thereto the whole operation may properly be held to come within the purview of the statute. The inclusion of an old structure into a practically new one does not take the process out of the meaning of the term "erection," used in a broad sense. Especially is that so when the sum of $12,000 is deemed necessary to effect the change and build the addition. This amount itself implies in this case a radical reconstruction of the building or the construction of a substantial addition thereto. In either case the money is to be used in the erection of a school building within the broad meaning of the term.

The objection that the resolution does not specify the manner of payment is technically correct. Sec. 475 requires the time and manner of payment to be stated. But the omission in the resolution is supplied by sec. 258*a*—1 and sec. 261, Stats. 1915. The former provides for annual instalments of principal and interest on all loans from trust funds to be payable on the first day of February of each year, and the latter limits the length of loans to school districts to fifteen years. The district voted the loan, and hence if it can lawfully be made from any available source its validity should be upheld. Construing it as a loan from the state trust funds we have this situation: The resolution does not comply with the strict requirements of the statute in that it does not specify the manner of payment, but, as pointed out, this omission is supplied by the statute. Having specified in the resolution that the time of payment should be fifteen years, the statute steps in and says the loan must be repaid in fifteen annual instalments, payable, with interest, on the first day of February of each year. The clause "or some other source," found in the resolution, may be treated as surplusage.

It was held in *Burgess v. Dane Co.* 148 Wis. 427, 134 N. W. 841, that the resolutions of minor deliberative bodies should receive a liberal construction to effectuate their evident

intent. Much more so should such a rule be applied to the resolutions of a district school meeting. The school code of 1911 provides for resolutions substantially as passed by the district, and that probably accounts for the forms used. The evident intent was to make a loan of $12,000. That was the substance of the matter voted upon. The electors having passed upon the substantial things, namely, that the loan of $12,000 should be made and should be repaid within fifteen years, the statute fixed the other terms of the loan. The failure of the resolution to state the manner of payment was an omission which the statute supplied, and the maxim "that is certain which may be rendered certain" applies. The circuit court, therefore, erred in holding that the proceedings did not authorize a loan from the state trust funds.

The fact that the resolution provides for an interest rate of four and one-half per cent. and the statute for only four per cent. on state trust funds does not invalidate it, for a lower rate is advantageous to the district.

By the Court.—Order reversed, and cause remanded with directions to enter an order sustaining the demurrer to the complaint.

ESCHWEILER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on October 3, 1916.

POLZEN, Respondent, vs. POLZEN, Appellant.

May 23—October 3, 1916.

Wills: Devise of homestead: Exemption.

1. Under sec. 2280, Stats., where a life estate in the homestead of a testator passes under his will to his widow, with remainder to his children, the remaindermen as well as the life tenant take it free and clear of all judgments and claims against the testator or his estate.
2. But the interest of a daughter, as one of such remaindermen, is liable for any judgment against her, it not being her homestead.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Affirmed.*

Partition of homestead.

Plaintiff and defendant are two of the heirs of Joseph Polzen, who died testate January 30, 1911, and left surviving his wife, Hedwich Polzen, three sons, and two daughters hereinafter named. His will was duly admitted to probate and the part thereof material upon this appeal is as follows:

"Unto my beloved wife Hedwich Polzen, all of my estate, both real and personal, to have and to hold for her maintenance and support during the term of her natural life."

"At the death of my said wife my estate, or the residue of my estate, shall be equally divided between my three sons and two daughters, namely, *John Polzen,* Maxmillian Polzen, Joseph Polzen, *Kathrina Polzen,* and Cecelia Klubertanz."

The defendant filed a claim against the estate of her father for services and was awarded judgment for $2,394 thereon. One G. H. Vogel obtained a judgment against the defendant in the county court on September 2, 1914, for the sum of $55.83. The widow, Hedwich Polzen, died intestate on September 2, 1914. Thereafter this action was begun for partition of the premises, resulting in a sale and division of the proceeds under the statute. The defendant claimed that she had a lien on the property for the amount of her judgment and that the said Vogel was not entitled to be paid the

amount of his judgment out of her part of the proceeds of the estate. At the trial it was stipulated that the father, Joseph Polzen, was at the time of his death the owner of the property; that the land consisted of thirty and one-fifth acres and that he was living thereon up to the time that he died and that it was his homestead at the time of his death; that the widow took under the will a life estate only, and that after her death it should be equally divided among the five heirs named. The county court of Waukesha county denied the claims of the defendant and directed the payment of certain costs and the payment of one fifth of the amount remaining to each of the five legatees named, except that out of the share of the defendant the said G. H. Vogel was to be paid the amount of his judgment, $58.49. From the judgment of the county court the defendant appeals.

For the appellant the cause was submitted on the brief of *Frame & Blackstone,* attorneys, and *Frederick A. Bangs,* associate counsel.

G. Holmes Daubner, for the respondent.

The following opinion was filed June 13, 1916:

ROSENBERRY, J. The defendant claims that because the widow, Hedwich Polzen, took a life estate in the homestead, the real estate in the hands of the remaindermen is subject to the payment of her judgment. The basis of this claim is not clear. It seems to be based upon the idea that, because the life estate descended to Hedwich Polzen free and clear of all judgments and claims under the statute, the homestead statute became thereby exhausted and did not protect that part of the estate which passed to the remaindermen under the will. We will not consider this proposition further than to say that it is ruled adversely to the defendant by *Foote v. Foote,* 159 Wis. 179, 149 N. W. 738.

The defendant further claims that her interest in the homestead of her father was not subject to the lien of the said Vogel. This claim seems to arise from a misunderstanding

of the exemption statute. The property in her hands was exempt from any judgment rendered against her father or his estate, but was liable for any judgment against her, as it was not in any sense her homestead, she being at the time admittedly a resident of Chicago.

We have considered the other assignments of error, but do not treat them at length. To do so would serve no useful purpose.

By the Court.—Judgment affirmed.

Eschweiler, J., took no part.

A motion for a rehearing was denied, with $25 costs, on October 3, 1916.

Hartwig, Respondent, vs. Ætna Life Insurance Company of Hartford, Conn., Appellant.

May 23—October 3, 1916.

Insurance: When contract complete: Accident policy: Delivery: Acceptance: Credit: Death of assured before payment of premium: "Default" in payment: Evidence: Questions for jury: Deduction of unpaid premium from recovery: Appeal: Modification of judgment: Costs.

1. If an application for an insurance policy is accepted and the policy is, either by the company directly or through its agent, deposited in the postoffice addressed to the applicant, who is thereafter to pay the premium therefor, and nothing to the contrary is expressed in the policy, the minds of the parties are presumed to have met and a binding contract of insurance is thereby made.
2. That credit for the first premium was extended to the assured may be shown by the circumstances characterizing the transaction and the general course of business as conducted by the insurance company through its agent.
3. The unexplained delivery of a policy without payment of the premium is *prima facie* proof of an extension of credit.

4. Although there was no direct contradiction of the testimony of an agent that he told the assured that an accident policy would not go into effect until the premium was paid, yet, there being circumstances bearing on the credibility of such testimony, a finding by the jury that the assured (who was accidentally killed before paying the premium) and the agent did not agree that the policy should not take effect until such payment, is *held* not clearly wrong.
5. An instruction to "collect and report" sent with the policy to the agent, who promptly sent the policy by mail to the assured without prepayment of the premium, did not preclude the completion of the contract by such delivery of the policy,—the jury having found that credit was extended to the assured.
6. The fact that the policy was sent to the assured by registered letter, a receipt for which was demanded, and with direction for return if not called for in five days, does not necessarily show that the delivery was conditional or the contract incomplete, where it appears that the letter remained in the delivery office for some weeks to the knowledge of the agent, who did not order it back but wrote to the assured to send on the premium.
7. The fact that the policy was sent to the assured without prepayment of the premium and with a letter asking for prompt payment was sufficient to warrant submitting to the jury the question whether there was an extension of credit to the assured which relieved him from the obligation to pay until after he received the policy; and evidence as to previous dealings with the assured and others and the general manner of doing business through the agent was competent upon that question.
8. Where an accident policy was sent to the assured by mail but remained in the delivery office for some weeks, during which time the assured was accidentally killed, evidence as to what the assured had said to members of his family and to the clerk at the postoffice in respect to the policy, during the period of delay, was competent, as part of the *res gestæ*, upon the questions whether he intended to accept the policy and whether his delay was for the purpose of postponing payment of the premium.
9. Where an insurance company issued a policy upon application of the assured and sent it to him by mail, trusting him to pay after receipt thereof, and he did not repudiate his offer to take it, he became obligated to pay therefor and the policy became operative.
10. Where credit was extended to the assured he was not in default within the meaning of a provision in the policy to the effect that in case of default in payment of any premium the policy would

not be in force during the period of default so as to cover any loss sustained during that period.

11. A premium for which credit had been extended and which was unpaid at the time of the death of the assured should be credited on the indebtedness of the insurer under the policy.

12. The matter of deducting an unpaid premium from the amount recovered on an insurance policy not having been brought to the attention of the trial court, the deduction is made on appeal without taking account of interest thereon and without affecting the costs.

Appeal from a judgment of the circuit court for Ozaukee county: Martin L. Lueck, Circuit Judge. *Modified and affirmed.*

Action by the beneficiary in an accident insurance policy to recover thereon.

The claim of plaintiff was that defendant, prior to September 12, 1914, issued to Max H. Hartwig one of its accident insurance policies, in which she, his wife, was named as beneficiary, insuring him against accidental death in the sum of $5,000, the insured to pay the premium therefor in the customary time; that the policy was in full force on such date when the assured came to his death from a cause within the risks insured against; and that, in due course, all conditions precedent to her right to commence and maintain an action to recover on the policy were performed.

Defendant claimed, among other things, that the policy sued on was not issued on credit; that August 14, 1914, the deceased made application for the policy through the company's agent, A. M. Wagner; that, in due course, such policy was issued and sent to said agent for "collection and report;" that it was not to go into effect until acceptance thereof by the assured and payment of the premium; that the premium was not paid nor the policy accepted; but on the contrary the assured neglected and refused to pay the premium or to accept the policy and that it was not in force at the time he was injured resulting in his death.

The case turned on whether the policy was in force on the 12th day of September, 1914. It was the third policy of the kind issued by defendant to Mr. Hartwig, on applications made through the agent who took the last one. The first was issued July 23, 1908, and sent to the assured July 26th, thereafter, without payment of the premium. He paid part thereof August 24, 1908, and the balance September 24th, thereafter, as the result of some urging to meet his obligation. The second policy was issued pursuant to an application dated April 14, 1910. It was sent to the local agent at the city of Port Washington, Wisconsin, with directions to deliver on payment of the premium. The assured did not make the payment and the policy was returned. The last policy was sent to the assured by registered letter August 17, 1914. It was transmitted by agent Wagner, who had received it with directions to "collect and report." It was so sent as to require a return receipt with a five-day limit of delay at the delivery postoffice. The letter accompanying the policy asked for prompt payment of the premium so remittance to the company could be made without delay. The letter reached the delivery office at 9:30 a. m. August 18, 1914. Hartwig was duly notified on that day by the postmaster and notified a second time August 20th, thereafter. Later he was notified several times by telephone of the presence of the letter at the postoffice awaiting his application therefor. It was in the office September 12, 1914, when he came to his death. The postal clerk was permitted to testify that in one of the telephone conversations which occurred some days before his death, he requested retention of the letter, promising to call for it. The deceased was a physician and was very busy attending to calls, during office hours, all the time during which he neglected to take the letter from the postoffice. No authority was expressly given by defendant, or in its behalf, to hold the letter beyond the five-day limit. Hartwig was requested by a letter dated September 10, 1914, to send in pay-

ment of the premium. After his death the agent ordered the policy back. It was returned accordingly and sent to defendant. Wagner testified that, when the application was made, he informed the assured that the policy would go into effect as soon as the premium was paid. That was under objection that it was inadmissible under sec. 4069, Stats., and because whatever was said became merged in the written application. The policy contained a provision to the effect that in case of default in paying any premium, subsequent acceptance of the same would operate to revive the policy only as to any loss happening thereafter.

Upon evidence proving or tending to prove all the circumstances above indicated, and other evidence under objection, of statements made by the deceased, respecting the policy, to his son Earl, his daughter Mildred, the local agent, Mr. Adams, the postmaster and his clerk, indicating that, up to the time of his death he intended to call at the postoffice for the letter, and evidence, under objection, regarding payment of premiums by other applicants for insurance as well as the manner the assured paid for the first policy, the court submitted the cause to the jury. They found (1) that the assured and the agent did not agree that the policy should not take effect until the premium was paid; (2) that it was mutually understood between the assured and the agent that the latter need not pay for the policy until he received it; (3) that the failure by the assured to take the policy from the postoffice was not due to a purpose not to accept; and (4) that such failure was not due to an intention to postpone the time for payment of the premium.

Upon such verdict judgment was granted to the plaintiff.

For the appellant there were briefs by *Collins & Collins,* attorneys, and *Daniel F. Flannery,* of counsel, and oral argument by *Mr. Flannery* and *Mr. William B. Collins.*

For the respondent there was a brief by *William F. Schanen,* attorney, and *James D. Shaw,* of counsel, and oral argument by *Mr. Shaw.*

The following opinion was filed June 13, 1916:

MARSHALL, J. A few well settled principles of law govern this case, if the findings are sustained by the evidence.

If a person applies to an insurance company for a policy of insurance, the application is accepted, and policy is unconditionally deposited in the postoffice, addressed to the applicant, either by the company direct or through its agent, he, later, to pay the premium therefor, and there is nothing to the contrary expressed in the policy, a binding contract of insurance is thereby made. Richards, Ins. (3d ed.) p. 99, note; *Armstrong v. Mut. L. Ins. Co.* 121 Iowa, 362, 96 N. W. 954; *Triple Link M. I. Asso. v. Williams,* 121 Ala. 138, 147, 26 South. 19; *Commonwealth Mut. F. Ins. Co. v. William Knabe & Co. M. Co.* 171 Mass. 265, 50 N. E. 516; *Hartford S. B. I. & I. Co. v. Lasher S. Co.* 66 Vt. 439, 29 Atl. 629; *Bailey v. Hope Ins. Co.* 56 Me. 474; 1 Joyce, Ins. § 62.

Credit may be given for the first premium and, if not expressly given, it may be shown to have been given by circumstances characterizing the transaction and the general course of business as conducted by the insurance company through its agent. *Tomsecek v. Travelers' Ins. Co.* 113 Wis. 114, 88 N. W. 1013; 1 Joyce, Ins. §§ 75–84.

The unexplained delivery of a policy without payment of the premium is *prima facie* proof of an extension of credit. 1 Joyce, Ins. § 85. In *Washoe T. M. Co. v. Hibernia F. Ins. Co.* 66 N. Y. 613, the policy provided that the company would not be liable unless the premium was actually paid to it. The policy was delivered without requiring payment. Payment was, thereafter, several times unsuccessfully demanded. The policy was not canceled nor was the holder notified that it would be void unless payment was made. The court held that the jury was justified in finding that the waiver of payment continued up to the loss and the company was liable. In *Tomsecek v. Travelers' Ins. Co., supra,* this court reviewed many cases on the subject, holding that a gen-

eral agent of an insurance company may waive the time of payment of the first premium, notwithstanding a provision in the policy that it will not take effect in advance of payment. The policy here did not contain any such provision. The adjudications cited by counsel for appellant, and quotations therefrom, which dealt with policies characterized by such a provision, are beside this case, and need not be referred to.

It is contended that, notwithstanding the verdict, there was no meeting of minds on the precise nature of the contract. While it is true that in making an insurance contract, the same as any other, it is essential that there shall be a meeting of minds; that does not mean that there must be an express agreement upon all details. The acceptance by an insurance company of an application for one of its policies and an unconditional deposit in the postoffice of such a policy, properly addressed, involves all requisites of a meeting of minds. *Commonwealth Mut. F. Ins. Co. v. William Knabe & Co. M. Co., supra;* Richards, Ins. (3d ed.) sec. 79. That applies particularly to the rate of insurance. Under such circumstances, the minds of the parties are presumed to have met that the policy shall be as usual, and the rate the usual one, or a reasonable rate, or the same as before where the applicant has previously had a similar policy. So there is no question but what there was the requisite meeting of minds here, unless the contrary appears from some circumstance yet to be considered.

It is contended that this case does not fall within the rule we have discussed because the deceased was told by the agent, when the application was taken, that the policy would not go into effect until the premium was paid. The only evidence on that was given by the agent, under objection. Waiving the question of whether the evidence was proper, under the rule prohibiting contradiction or variation of a written contract by parol, and whether it was proper under sec. 4069, Stats., it was a jury question as to whether any such circum-

stance occurred as the agent testified to, and the finding, in respondent's favor, settled the matter. True, there was no direct contradiction of the agent's testimony, but there were circumstances bearing on its credibility which appear in the record and there were, probably, others which do not appear. The trial judge had the advantage of seeing the witness and hearing his testimony given, and came to the conclusion from the whole situation that its credibility was so involved, that the jury should be permitted to pass upon it. The result is not so clearly wrong, if wrong at all, as to warrant disturbing it.

It is further contended that there was no efficient delivery by mail to close a contract of insurance because the policy was sent to the agent coupled with the condition that he should "collect and report." The instruction is not free from ambiguity. There is a strong probability that it did not differ from the usual course where the policy is sent and charged to the agent with the expectation that he will report collection on it with other collections, make his remittance, and obtain his credit. True, there is no very definite evidence as to the customary course of business, but there was enough to raise the question in respect thereto. On the whole, what was meant by the instructions to "collect and report," in view of the fact that the policy was, promptly, upon its receipt by the agent, transmitted to the deceased without prepayment of the premium, is fairly involved in whether credit was extended, in respect to which the jury found in respondent's favor.

It was further suggested that the policy was transmitted, conditionally, because of its having been sent by registered letter, demanding a receipt, and of the direction on the package to return if not called for within five days. Whether those circumstances evidence a condition of the deceased having the policy, or merely a precaution against its going astray and to secure evidence of its having reached his hand, is so involved as to fairly fall within the subject of extension of

credit. The fact that the package remained at the delivery office for some three weeks after expiration of the five days, to the knowledge of the agent, and he acquiesced therein, by not ordering it back, and by writing to the assured to send on the premium, which appears by the evidence without controversy, rather indicates that the five-day return feature was not a condition, or, if it were, the condition was waived.

It is further contended that there was no evidence warranting the finding that there was an extension of credit to the deceased which relieved him from the obligation to pay the premium until he received the policy into his possession. What we have already said sufficiently answers that in favor of respondent. The fact that the policy was transmitted in advance of the premium being paid, was sufficient, of itself, to warrant submitting the matter to the jury. The letter accompanying it, asking for prompt payment, certainly suggests that deceased was trusted to pay after receiving the policy. There were many other circumstances, including the history of previous dealing with the deceased and others, and the general manner of doing business through the agent. We will not take time to go into all the details. The evidence was all competent, in our judgment, as circumstantially explaining the transmission of the policy in advance of payment.

There was evidence to carry the question to the jury of whether the deceased intended not to accept the policy and whether his delay was for the purpose of postponing payment. In this connection we note the contention that the evidence of what the deceased said to members of his family and to the clerk at the postoffice in respect to the policy, during the period of delay, was incompetent. We think his state of mind in respect to the matter, as characterized by the circumstances referred to, was very material and that such circumstances were competent evidence as matter of *res gestæ*.

It is further contended that the policy did not become operative because the premium was not paid and the assured

did not become obligated to pay it. That payment of the premium was not necessarily a condition of the policy becoming operative, we have seen. If it was sent to the assured, trusting him to pay after receipt thereof, and he did not repudiate his offer to take it, as the jury found, then, of course, he became obligated to pay therefor. Treating the findings of the jury as verities, all elements of a complete contract existed and persisted to the end.

The policy contained a provision to the effect that, in case of default in payment of any premium on the policy, it would not be in force during the period of default so as to cover any loss sustained during such period. It is contended that such provision is fatal to the judgment, as the assured was in default when he was injured. Whether such provision included the first premium on such a policy is not clear. But let that be as it may, as the jury found credit was extended to the assured, he was never in default.

We have now treated in general, or particular, all points raised by counsel for appellant which seem to merit it without discovering any reason for reversing the judgment. True, the conduct of the assured, in neglecting for a long time to take his policy from the office, was not very satisfactorily explained; but there was enough evidence on the subject to carry the question to the jury as to whether he intended to, or did, reject the policy. That respondent did not consider it rejected is quite strongly indicated by the fact that the agent acquiesced in its not being returned, did not cancel it, or notify the assured that it would not be treated as operative, and, with knowledge of the delay, requested assured to remit the premiums. That, in connection with all the other circumstances to which we have referred, is quite as indicative of a waiver of payment, continuing up to the time of the accident which resulted in the death of assured, as existed in *Washoe T. M. Co. v. Hibernia F. Ins. Co.* 66 N. Y. 613, referred to before in this opinion.

The unpaid premium should have been credited on the policy indebtedness and judgment entered only for the remainder. That, doubtless, would have been done had the attention of the trial court been called to the matter. We have concluded that the application should be made now; but, under the circumstances, without effect as to costs. It will be a substantial correction of the judgment, and all that is due, considering the delay in raising the question, to allow the unpaid premium of $30 as a deduction from the judgment, not taking account of interest thereon from the date of the policy to the date of the judgment.

By the Court.—The judgment is modified by reducing it $30 as of the date it was rendered and affirmed, as so modified, full costs in this court to go to respondent.

Eschweiler, J., took no part.

A motion for a rehearing was denied, with $25 costs, on October 3, 1916.

LeBeau, Appellant, vs. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Respondent.

September 12—October 3, 1916.

Negligence: Proximate cause: Resulting damages: Reasonable anticipation: Railroads: Carrying passenger beyond destination: Judgment: Acceptance of option: Waiver of errors.

1. An injury is not proximately caused by a negligent act unless the wrongdoer ought reasonably to have anticipated that an injury to some person would result therefrom; but the resulting damages are proximately related to the injury if they follow it as a natural consequence by an unbroken chain of causation, even though the wrongdoer had no reasonable ground to anticipate that such damages would result from his negligent act.
2. Where a woman, who had by negligence of a railway company been carried to a station five miles beyond her destination, un-

necessarily and unreasonably walked back that distance in the snow on a cold and stormy day, and as a result thereof became ill, it is *held* that such result was caused by her own voluntary and negligent act and was not proximately related to the negligent act of the railway company. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, distinguished.

3. Where a defendant elected, when given an option by the trial court, to submit to a judgment against it for a small sum and so terminate the litigation, and afterwards caused such judgment to be entered, it thereby waived the right to object, on plaintiff's appeal, to the judgment or the amount of the damages.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

The action was for damages claimed to have been caused plaintiff by negligence of defendant in carrying her, while a passenger on one of its trains, beyond her destination.

The claim of plaintiff was that January 1, 1915, she was on defendant's train with a ticket entitling her to travel thereon from Goodman, Wisconsin, to Gladstone, Michigan; that the train was scheduled to arrive there at 5:30 a. m.; that the conductor took her ticket and placed a check in the window at her seat, indicating the terminal point of her journey; that the trainmen neglected to take such check and call her station as the train arrived there; that in consequence, she was carried by to Masonville, a distance of some seven miles; that she had no funds and could not procure any to defray expenses back to Gladstone so was compelled to, and did, walk back; that she had important business requiring her to reach Gladstone before noon; that the day was cold and stormy and she was not properly clad to make the journey from Masonville to Gladstone on foot and, in so doing, she caught a severe cold and was physically disabled.

Defendant answered, putting in issue plaintiff's allegations of negligence and pleading contributory negligence.

There was evidence to this effect: Plaintiff was carried by her destination as alleged. She was accompanied by her son, who was twenty-two years of age. He was sleeping when

the train arrived at Gladstone. She was unfamiliar with the country and relied on the trainmen to notify her of the arrival at Gladstone. As to whether she was so notified the evidence was in conflict. There was further evidence to this effect: The conductor discovered plaintiff had been carried by her destination when the train had proceeded not over two miles beyond it; but he refused to enable her to alight, saying he had to stop at Masonville, which was five miles from Gladstone, and she could leave the train there, which she did. She and her son then went to the home of a family, living near by, with which the son was acquainted, and took breakfast. About 9:30 a. m. she started to walk to Gladstone. She was accompanied a short distance by her son and a young woman of the family where she had taken breakfast. The son was keeping company with the young woman. There was a livery-stable right across the way from where she took breakfast at which she could have gotten a conveyance for Gladstone at a cost of one dollar and fifty cents. There was a bus making regular trips to Gladstone and the fare was fifty cents. There was an opportunity to return to Gladstone by train, but too late in the afternoon to satisfy her needs. She had fifty cents in money and her son at least two dollars and fifty cents. It required twenty-five cents to pay her fare from Gladstone to Escanaba, to which place she was bound to see a sick child of her daughter. She was informed by some one that it would cost her five dollars to be taken back to Gladstone, but she did not inquire for any bus nor make inquiry at the livery-stable. It was a very stormy day, so plaintiff's clothes were wet through and it took her some three hours to complete her journey. She was made sick and was considerably disabled in consequence of her walk. She arrived at Gladstone and took an interurban car so she reached her daughter's home at about 2:45 in the afternoon. The jury found in her favor, that she was carried by her destination through negligence of defendant; that such negligence was the proximate cause of

her injury; that she was not guilty of contributory negligence, and was damaged to the extent of $1,250.

The trial court held that the consequences to plaintiff of her walking to Gladstone were not proximately related to defendant's negligence, and that unless defendant would consent to a judgment for $200, a new trial should be had. It thereupon so consented.

Motions were regularly made on behalf of defendant for relief from the verdict, including one for judgment in its favor on the evidence and one for a new trial, which were overruled. It excepted to the rulings in that regard and stated in writing that the consent to judgment was for the purpose of bringing about an amicable settlement of the case; but it reserved its right to claim a reversal upon appeal by plaintiff, upon the grounds stated in the motions after verdict; that defendant was satisfied the plaintiff was not entitled to judgment and, in any event, not to judgment for $200. Judgment was rendered in plaintiff's favor, on defendant's motion, for $200 and costs.

Notice was duly served under sec. 3049*a*, Stats., that, upon plaintiff's appeal, defendant would assign errors because the trial court overruled its motion for a directed verdict, and its motions after verdict.

Plaintiff duly excepted to the order compelling her to submit to a judgment in her favor for $200 and costs, and appealed from such judgment.

For the appellant there was a brief by *Rex I. McCreery,* attorney, and *Kaftan & Reynolds,* of counsel, and oral argument by *Mr. McCreery.*

For the respondent there was a brief by *W. A. Hayes,* attorney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.*

MARSHALL, J. It will be seen that judgment on the verdict as rendered was denied upon the ground of there being

no proximate relation between the damages to plaintiff by reason of her walking from Masonville to Gladstone, and the negligent act of respondent. Did the court err in that regard? That is the question we have to deal with.

We must distinguish between proximate relation from the point of view of respondent when the wrong was committed, and such relation in respect to resulting damages. In the former there must be, at the instant of the wrong, the element that the wrongdoer, in the exercise of ordinary care, ought reasonably to have apprehended that some personal injury might probably follow to another. As to the latter, the element of reasonable apprehension is immaterial. It is only vital that there should be a direct causal connection between the injury and the damage; not, necessarily, an immediate causal connection, but such connection by an unbroken chain of events so it may be said that the damage was a natural consequence of the injury, having regard for the usual course of nature and of cause and effect in a line of unbroken causation. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 359, 11 N. W. 356, 911; *Crouse v. C. & N. W. R. Co.* 104 Wis. 473, 483, 80 N. W. 752; *Fisher v. Western Union Tel. Co.* 119 Wis. 146, 153, 96 N. W. 545; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475. If the damage follows the wrongful act "in an unbroken sequence, that is, without any intervening, independent cause to break the continuity" then such damage is proximate to the injury, though the wrongdoer had no reasonable ground to apprehend it would occur from the negligent act.

This court has admonished in respect to the importance of distinguishing between the result as applied to the injury and that as applied to the damage. *Fisher v. Western Union Tel. Co., supra.* This case falls within the second class mentioned. The wrong was complete when appellant was negligently carried by her destination. No damage, to speak of, was the immediate result. All, substantially, was such result of the walk back to Gladstone which did not commence

until several hours after the arrival at Masonville. In the meantime appellant was perfectly safe. She found comfortable quarters at the home of a family with which her son was acquainted, where she had breakfast. Her peril commenced when she began her five-mile walk, which took her some three hours. That she was seriously damaged by such journey, appears, pretty clearly, from the evidence. Was such journey a natural consequence of the negligent act of respondent, undertaken in the exercise of ordinary care under all the circumstances? If it were not, then it was her voluntary act and broke the chain of causation, starting with respondent's negligence, and commenced a new chain which reached to and included the disabilities forming the basis, in the main, of the finding as to the damages.

Counsel for appellant relied below, and here as well, on *Brown v. C., M. & St. P. R. Co., supra,* and similar cases. It was properly held that such cases were not controlling if appellant unreasonably made the journey on foot. In the *Brown Case* the recovery for the sickness immediately produced by the walk was sustained because plaintiff was caused to leave the train and, under such circumstances, that she reasonably walked three miles in the nighttime, and in inclement weather, to her destination. When she so left, she did not know where she was. There were no buildings in sight. A long freight train obstructed her view in the direction of such buildings as there were. In such circumstances she started west on the track and kept on to her destination, without seeing any building until she got so near such destination that it seemed she better go on rather than seek shelter otherwise. This court held that she was not guilty of any fatal negligence under the circumstances.

Thus it will be seen that the decision in the *Brown Case* was grounded on the fact that it was characterized by an unbroken chain of causation reaching from the negligent act of the railway company to the damage sought to be recovered. The idea was that she was placed in a situation of peril by the

carrier and was not guilty of any want of ordinary care in extricating herself from it. Here the trial court was of the opinion that the principle of the *Brown Case* did not apply because there was an efficient intervening cause happening after the wrong of the carrier,—the voluntary negligent act of appellant in making the perilous journey she did.

The principle of *Brown v. C., M. & St. P. R. Co.* was controlling in *Patry v. C., St. P., M. & O. R. Co.* 82 Wis. 408, 52 N. W. 312; *Nelson v. C. & N. W. R. Co.* 130 Wis. 214, 109 N. W. 933; and other cases decided by this court, and in many found in other jurisdictions. The following are good illustrations: *Indianapolis, B. & W. R. Co. v. Birney,* 71 Ill. 391; *Texas & P. R. Co. v. Cole,* 66 Tex. 562, 1 S. W. 629; *Carter v. Southern R. Co.* 75 S. C. 355, 55 S. E. 771; *Natchez, C. & M. R. Co. v. Lambert,* 99 Miss. 310, 54 South. 836; *Chicago, R. I. & P. R. Co. v. Brisbane,* 24 Ill. App. 463; *Chicago & E. I. R. Co. v. Mitchell,* 56 Ind. App. 354, 105 N. E. 396; *St. Louis S. W. R. Co. v. Foster,* 46 Tex. Civ. App. 517, 103 S. W. 194; *International & G. N. R. Co. v. Terry,* 62 Tex. 380.

Perhaps the most significant case cited is *Indianapolis, B. & W. R. Co. v. Birney, supra.* Plaintiff, a physician, who was on his way to see a patient, was wrongfully left at a station several miles from his destination. He had his option to remain six hours for the next train, or procure some other conveyance. He could have so remained in a safe place. It was such a cold day that to walk to the next station was, as he must have known, perilous to his health. He did not use reasonable care to obtain passage by train, or some other comfortable way, but, unnecessarily, risked his health by walking. Damages resulted. It was held that his conduct broke the chain of causation between the negligent act of the railway company and the damages, and, therefore, he could not recover, the court saying:

"He should have used all precautions in so making the journey as to produce the least injury to himself that reason

would dictate. He had no right to act with recklessness or wantonly, and then claim compensation for the injury thus inflicted. Had he attempted to walk to the next station barefoot, and his feet had been frozen, would any sane man believe he could have recovered for such injury?" "The injury . . . was unnecessarily, if not recklessly, induced. It was the improper, voluntary act of appellee. . . . He must be confined to the proximate and natural damages resulting from the wrong."

The element of proximate relation was thus spoken of in respect to whether the chain of circumstances, commencing with the carrier's negligent act, was severed by negligence of the plaintiff.

The principle by which this case is to be tested is clearly defined in *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 11 N. W. 356, 911, and if the trial court was not clearly wrong in holding that appellant's conduct broke the chain of causation commencing with respondent's negligent act, so it did not reach to her sickness resulting immediately from her walk to Gladstone, then the decision that she was not entitled to recover therefor cannot be disturbed.

After carefully studying the evidence, we are unable to hold in favor of appellant. It appears, beyond dispute, that she was not in any danger until she started out on the walk to Gladstone. She was comfortably located with a family with whom her son was well acquainted. There was no pressing necessity for her to immediately complete her journey. She and her son had ample money to pay her expenses from Masonville to Escanaba. She did not make reasonable efforts, under the circumstances, to reach Gladstone without doing so by walking. The conditions were so bad that the railroad trains were behind time and it took her some three hours to walk the five miles. The snow and slush were so bad on the railway track, and it was so stormy, that any one, however strong, would not have made the journey she did unless there was some very pressing necessity therefor. The situation can best be told by the condition she testified she

was in at the end of her journey, and her relation as to the weather. She said: "The track was full of snow and it was storming awfully. When I reached Gladstone I was almost frozen. I was wet clear up to my waist, and ice and icicles up over my skirts, and my shoes were wringing wet. You could wring water out of them."

Facing the foregoing, is there any wonder that appellant experienced serious consequences from her journey. If those consequences were proximately connected with respondent's negligent act, it should repair her damage; but if they were the result of her own voluntary, imprudent act, it should not, and such is the rule of *Brown v. C., M. & St. P. R. Co.* We are unable to reach the conclusion that the trial court was wrong in respect to the matter. There does not appear any satisfactory evidence to justify appellant in subjecting herself to the danger which she did. She, doubtless, could have remained where she was entertained at breakfast until the train came back in the afternoon by which she could have returned to Gladstone for about fifteen cents. It would have postponed her arrival at her sister's for a few hours, but that does not appear very material. Had she exercised reasonable care in the matter, she would have discovered that she could return to Gladstone by bus for fifty cents, or livery for one dollar and a half, and have obtained that service. More need not be said.

As to the exceptions urged upon our attention on behalf of respondent, it seems that the claimed errors were waived by respondent formally accepting the offer of opportunity to submit to a judgment for $200 and costs, and so terminate the litigation, and causing judgment to be entered accordingly. Such is the reasonable conclusion and is required by *Agnew v. Baldwin,* 136 Wis. 263, 116 N. W. 641.

By the Court.—The judgment is affirmed.

M——, Respondent, vs. J——, Appellant.

September 12—October 3, 1916.

Slander: Words actionable per se: *Understanding of hearers.*

1. Spoken words which falsely impute to a woman a want of chastity and in their ordinary meaning charge her with a criminal offense are actionable *per se.*
2. To render such an utterance nonactionable on the ground that the hearers did not understand the colloquium to charge the offense conveyed by the words spoken, it must be shown to the satisfaction of the jury that the words were not intended to impute to the person concerned the offense they ordinarily convey.
3. The construction or understanding testified to by witnesses cannot control the court or jury as to the meaning actually conveyed.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This is an action to recover damages for slander.

The plaintiff became the housekeeper for the defendant in October, 1911, and by arrangement brought her twelve-year-old son with her. She remained in this position about two and one-half years, at which time she informed defendant that she had decided to leave on account of the heavy burdens of caring for defendant's imbecile son. Defendant wished plaintiff to remain in his employ and endeavored to induce her to do so. Plaintiff left defendant and went to work for defendant's brother-in-law, who was a neighbor of the defendant. Defendant made unsuccessful efforts to have the plaintiff return and keep house for him. It is claimed that a short time after this, while defendant and one of his neighbors were discussing certain stories that were being circulated in the neighborhood charging defendant with libidinous and lewd conduct, the defendant then and there spoke of and concerning the plaintiff the following false and defamatory words: "*M.* [the plaintiff] isn't as good as she pretends to be. I went to bed one night and *M.* came up to my room and

jumped into bed with me. I said, Hold on, *M.*, this will not do. We are supposed to be good, decent, respectable people, and what will the neighbors say when they find this out? and she [plaintiff] said, That is all right, no one will know about this except you and I." The person to whom these words were spoken circulated them and they finally reached plaintiff. It appears that plaintiff had been suffering from a nervous breakdown, and after hearing this story from several of her friends has been unable to recover from this ailment.

The jury returned a verdict finding the defendant guilty of uttering the slander charged and assessed plaintiff's damages in the sum of $500. Judgment was entered in favor of the plaintiff in the sum of $500, together with the costs and disbursements of the action. From such judgment this appeal is taken.

For the appellant there was a brief by *George Hoxie*, attorney, and *Classon & O'Kelliher*, of counsel, and oral argument by *V. J. O'Kelliher*.

For the respondent there was a brief by *Lehner & Lehner*, and oral argument by *Philip Lehner*.

Siebecker, J. The allegations of the complaint set forth a good cause of action. The alleged defamatory words impute to the plaintiff a want of chastity and in their ordinary meaning charge her with an offense made punishable by law in this state. A false oral charge of this nature has been held actionable *per se*. *Ranger v. Goodrich*, 17 Wis. 78; *Mayer v. Schleichter*, 29 Wis. 646; *Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249. To render the alleged oral utterance nonactionable on the ground that the hearers did not understand the colloquium to charge the offense conveyed by the words spoken, it must be shown to the satisfaction of the jury that the words were not intended to impute to the person concerned the offense they ordinarily convey. *Hacker v. Heiney*, 111 Wis. 313, 87 N. W. 249; *Hamlin v. Fantl*, 118

Wis. 594, 95 N. W. 955; *Kloths v. Hess,* 126 Wis. 587, 106 N. W. 251. The construction or understanding testified to by witnesses cannot control the court or jury as to the meaning actually conveyed. *Kloths v. Hess,* 126 Wis. 587, 591, 106 N. W. 251, and other cases there cited. It is evident from the record and the verdict rendered that the jury found the words were uttered with intent to defame the plaintiff and that they were so understood by the person to whom they were spoken. The jury were well warranted in so finding, under the facts and circumstances adduced in evidence. The evidence amply sustains the amount of damages awarded by the jury.

By the Court.—The judgment appealed from is affirmed.

WILL OF DURKEE: HAIRE, Appellant.

September 13—October 3, 1916.

Executors and administrators: Probate of will: Jurisdiction: Residence of testator: Administrator de bonis non: *Appointment: Appeal by foreign administrator: Dismissal: Harmless error.*

1. Primary jurisdiction to admit a will to probate and to grant letters testamentary vests in the county court of the county of the testator's residence at his death.
2. Where, after due notice to all parties, a county court in this state admitted a will to probate and assumed general and primary jurisdiction of the estate, it decided that the testator was a resident of that county; and such decision, never having been appealed from or reversed, settled that question so far as the parties are concerned in all subsequent actions in the courts of this state.
3. It appearing in such case, after the discharge of the executor, that there was personal estate of the deceased which had not been administered upon, the county court properly appointed an administrator *de bonis non,* and, no objection being made to his fitness, an appeal from the order appointing him could result only in an affirmance; hence the dismissal of an appeal there-

from by an administrator *de bonis non* previously appointed in another state was, if error, not prejudicial.

[4. Whether the word "administrator" in sec. 4031, Stats.,—authorizing an appeal from any order of the county court,—includes an administrator appointed under the laws of another state, not decided.]

Appeal from a judgment of the circuit court for Kenosha county: E. B. Belden, Circuit Judge. *Affirmed.*

This is an appeal from a judgment dismissing an appeal from an order of the county court granting letters of administration *de bonis non.*

The facts are that Charles Durkee died testate in Utah in 1870. His will was probated in the county court of Kenosha county, Wisconsin, it being alleged in the petition for probate that Durkee was a resident of said county. There is no claim of any defect in these proceedings. Harvey Durkee and Franklin H. Head were named as executors in the will, but Durkee resigned his trust and Head proceeded with the administration and reported the estate fully administered in 1882, at which time he was discharged from his trust. In 1896, upon petition of some twenty of the heirs at law of the deceased, representing that he was a resident of Utah at the time of his death and that he left personal estate to an unknown amount which was unadministered, one Kuykendahl was appointed by the probate court of that state administrator with the will annexed of the estate of the deceased and duly qualified.

In September, 1911, two of the heirs at law of the deceased (by their attorney in fact) petitioned the county court of Kenosha county to appoint *Henry J. Hastings* (public administrator of said county) as administrator *de bonis non* of the estate, representing that the deceased left both real and personal estate which was unadministered. Upon the hearing of this petition, after due notice given, Kuykendahl appeared and filed objections to the granting of such administration on the ground that he himself was the lawful admin-

istrator *de bonis non.* Some testimony was taken and *Hastings* was appointed administrator *de bonis non* and qualified. Thereupon Kuykendahl appealed to the circuit court. He died in September, 1913, and *Norman W. Haire* was appointed as his successor by the proper court of Utah and substituted as appellant by the circuit court for Kenosha county. Upon hearing of the appeal the court dismissed the same on the ground that Kuykendahl was not a person entitled to appeal under the terms of sec. 4031, Stats., which provides that, in all cases not otherwise provided for, "any executor, administrator, guardian, trustee or any person aggrieved by any order . . . of the county court may appeal therefrom to the circuit court." The court held that *Haire* was merely an ancillary administrator and that the words "executor, administrator," etc., in this section do not refer to mere ancillary administrators appointed in other states, and that such an administrator could not be considered aggrieved by the appointment of an administrator *de bonis non* in this state.

For the appellant there was a brief by *Cavanagh, Barnes & Cavanagh,* and oral argument by *Richard P. Cavanagh.*

Henry J. Hastings, for the respondent.

WINSLOW, C. J. We do not find it necessary to decide whether the word "administrator" in sec. 4031, Stats., includes an administrator appointed under the laws of another state. This may admit of doubt. In any event, however, the foreign administrator here is in no respect injured by the dismissal of his appeal. This results because, (1) when a person dies testate, primary jurisdiction to probate his will and grant letters testamentary vests in the county court of the testator's residence at his death (*Will of Hess,* 97 Wis. 244, 72 N. W. 638; 18 Cyc. 67); (2) it was necessarily decided by the Kenosha county court, when it probated Durkee's will and assumed general and primary jurisdiction of the estate, that Durkee was a resident of that county;

(3) that decision, rendered after due notice to all parties and never appealed from or reversed, settles the question so far as the parties are concerned in all subsequent actions in the courts of this state (*Huebschmann v. Cotzhausen,* 107 Wis. 64, 82 N. W. 720); it was the duty of the county court to appoint an administrator *de bonis non* when, after the discharge of the executor and the closing of his administration, it appeared that there was estate which had not been administered upon (R. S. 1898, sec. 3804); (4) the parties agree that there was personal estate left by the deceased consisting of choses in action of various kinds which had not been administered upon; (5) no objection being made to the fitness of *Mr. Hastings,* it follows from the foregoing propositions that the county court simply performed its duty in making the appointment in question; hence, even if the appellant was entitled to appeal, his appeal would only result in affirmance of the order. Under such circumstances the dismissal of his appeal, even if erroneous, cannot be considered a prejudicial error. For such an error there can be no reversal. Sec. 3072*m,* Stats.; *Milwaukee v. Plath,* 156 Wis. 586, 146 N. W. 782.

By the Court.—Judgment affirmed.

THRONSON, Appellant, vs. UNIVERSAL MANUFACTURING COMPANY and others, Respondents.

September 13—October 3, 1916.

Corporations: Unlawful issuance of stock: Invalidity: Right of purchaser to rescind: Public policy: Unlicensed foreign corporations.

1. **A sale by a corporation of its theretofore unissued corporate stock for less than par value, being prohibited by sec. 1753, Stats., and in violation of the public policy of the state, is void.**

2. Both the purchaser and the corporation in such case are participants in an illegal transaction, and the former cannot have judicial aid to secure a rescission of the transaction and restoration of the consideration paid.
3. In view of sub. 10, sec. 1770*b*, Stats., subjecting foreign corporations to the same restrictions that are imposed upon domestic corporations, the rules above stated are applicable to both.
4. The fact that a foreign corporation so unlawfully selling its stock in this state has not been licensed to do business here does not debar it from the benefit of the public policy of the state which precludes a rescission of the sale at the suit of the purchaser, and it is the duty of the courts to enforce such policy whether invoked by a litigant or not.

APPEAL from a judgment of the circuit court for Racine county: GEORGE CLEMENTSON, Judge. *Affirmed.*

An equitable action to rescind the sale of 134 shares of the corporate stock of defendant company on the ground of fraud. The claim of plaintiff was that he was induced to purchase stock of a corporation by false representations made in its behalf, particularly, by defendant *Ernest H. Smieding* as manager, paying for such stock $10,000. Plaintiff sought to avoid the sale and to recover back the sum paid. The alleged grounds of fraud are, briefly, as follows:

February 2, 1914, *Ernest H. Smieding,* as general manager and treasurer of defendant corporation, solicited plaintiff to purchase shares of its corporate stock, representing that it was sole owner of letters patent covering automobile accessories which it was manufacturing, and of the ground and buildings in Racine, Wisconsin, where its manufacturing business was being carried on, which was ample for all probable needed additions to the plant; that its indebtedness to banks did not exceed $6,000, and that one Carpenter, a prominent business man of Racine, was owner of $40,000 par value of the stock. Plaintiff requested a financial statement, showing the condition of the corporation, which was declined upon the ground that it would require shutting down and taking an inventory, *Smieding* assuring plaintiff that

everything was all right and as he had stated; that the stock was well worth par; that the business was rapidly increasing and would soon pay good dividends; that a limited amount of the stock was being offered at $75 per share because of urgent needs of the company for more capital; that everything was O. K., the company in good condition, its assets greatly exceeding its liabilities, and that no reason existed why any one could not safely buy the stock at the price it was offered at. Defendant Fred W. Stillwell, in behalf of the corporation, assured plaintiff that no preferred stock had been issued and that the statements made by *Smieding* were correct. Plaintiff paid $10,000 for 134 shares of the stock of the corporation, relying upon such representations being true, whereas they were false and known to be so by the person who made them. The corporation did not own any patents, nor its factory building and premises, nor any grounds adjoining. The patents were owned by persons to whom the corporation was obligated to pay royalties. The indebtedness of the corporation to banks exceeded $16,000. Charles R. Carpenter held $35,000 preferred stock as owner or security for indebtedness and the corporate stock was in fact valueless. The facts were fraudulently concealed from plaintiff as to the true condition of the corporation and that most of the stockholders had obtained their stock without paying anything therefor. He did not learn the truth as to the financial condition until August 20, 1914, nor of the fraudulent concealment until September 19, 1914.

The complaint stated other matters which, so far as necessary to appear here, are referred to in the findings.

There were answers putting in issue all the allegations of fraud.

Upon the evidence, the court decided the facts to be: (1) Defendant corporation was organized under the laws of the state of Michigan with a capital of $300,000, divided

into 3,000 shares of $100 each, 1,000 shares being common, and 2,000 shares preferred stock. During the times mentioned in the pleadings, it was such foreign corporation, engaged in manufacturing automobile accessories in the city of Racine, Wisconsin, but was never licensed to engage in business in this state. (2) Fred W. Stillwell was the secretary, and defendant *Smieding,* treasurer and general manager. (3) February 14, 1914, plaintiff purchased of the corporation, acting by said *Smieding,* sixty-six shares of its common stock, paying $5,000 cash therefor, and, shortly thereafter, so purchased sixty-eight shares more of such stock, paying a like agreed price therefor; but in property, so the corporation realized not more than $3,500 in money. (4) Plaintiff so purchased the stock because he could obtain it for much less than par value, and because of general repute and statements of others than defendants that the corporation was becoming successful and its business increasing, and his desire to obtain a place for his son, and not by any misrepresentations or fraud of defendants. (5) *Smieding* did not make any of the alleged misrepresentations. What he did say was based, as plaintiff knew, upon expected future business and estimated profits, was said in good faith and as expressions of opinion, as plaintiff knew; he was neither misled nor induced thereby to purchase the stock. (6) Upon acquiring the stock, plaintiff was made a director of the corporation and, April 16, 1914, was made president, which office he held until September 22, 1914, when he resigned. When he was elected president, he knew the corporation was not authorized to do business in this state, and knew, or from circumstances brought to his attention ought to have known, the truth of all matters in respect to which false representations and fraud are claimed, yet elected to retain his position with the company until after the failure of the Merchants & Savings Bank of the city of Racine, September 17, 1914, to which the corpora-

tion was largely indebted, such event rendering probable, as he thought, failure to realize the anticipated profit from the stock.

From such facts the court concluded that plaintiff was not entitled to relief on the ground of the alleged false representations, and, in any event, was precluded from obtaining the relief sought by reason of his having purchased the stock at less than its par value and his subsequent conduct.

Plaintiff requested findings inconsistent with those made, which were refused. Exceptions were duly filed to the findings which were inconsistent therewith. Judgment was entered, as ordered, dismissing the complaint with costs.

For the appellant there was a brief by *Thompson, Myers & Kearney,* and oral argument by *Wm. D. Thompson.*

For the respondent *Smieding* there was a brief by *N. L. Baker & W. J. Zimmers,* and oral argument by *Mr. Baker.*

Vilas H. Whaley, for the respondent *Dwight,* trustee in bankruptcy of the *Universal Manufacturing Company.*

Marshall, J. It is considered that appellant was properly denied relief, irrespective of whether the trial court reached the right conclusion in respect to whether he was induced to purchase the stock by false representations of material facts.

It is undisputed that appellant purchased original stock from the corporation and the certificate therefor was issued to him for less than par value. Sec. 1753, Stats., provides as follows:

"No corporation shall issue any stock or certificate of stock except in consideration of money or of labor or property estimated at its true money value, actually received by it, equal to the par value thereof, . . . and all stocks . . . issued contrary to the provisions of law . . . shall be void."

Under such statute this court held in *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492, that a sale by a corporation of its corporate stock, as in this case, for less than par value,

being prohibited by law and in violation of the public policy of the state, is void and that the purchaser and seller are participants in an illegal transaction and, so, notwithstanding the illegality, judicial remedies are not available to the former to recover back the consideration paid. By the same reasoning with which that conclusion was reached, such a purchaser of stock is not entitled, under any circumstances, to judicial aid to secure a rescission of the transaction and restoration of the consideration he parted with. The courts will leave both parties where they have placed themselves.

True, the cited case dealt with a domestic corporation, but since language was used, referring to corporations in general, it does not seem that the decision can be restricted to domestic corporations in view of sub. 10, sec. 1770*b*, which is as follows:

"All foreign corporations and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized under the laws of this state, and shall have no other or greater powers."

That was adopted from the state of Illinois. The purpose of it was "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law." *Stevens v. Pratt,* 101 Ill. 206; *Floyd v. Nat. L. & I. Co.* 49 W. Va. 327, 38 S. E. 653; *Farmers' L. & T. Co. v. Lake St. E. R. Co.* 173 Ill. 432, 51 N. E. 55; *Connolly v. Union S. P. Co.* 184 U. S. 540, 22 Sup. Ct. 421. So we are unable to see why *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492, does not apply here. It clearly does by the reasoning of the Illinois court which must be presumed to have been adopted by the legislature in adopting the statute of that state.

No more need be said in this case. If it was open for a decision on the merits, aside from the statutory condemnation, a different result might be reached; but we seem to be

precluded by the settled law from efficiently going into that subject.

We do not overlook the point made by appellant that respondents cannot properly have the benefit of the statutory prohibition because of noncompliance by the corporation with the law as regards becoming licensed to do business here. That might be true if the situation were not one where the public policy of the state is involved. In such a situation, it is the duty of the court to enforce such policy, irrespective of whether it is invoked by a litigant or not. *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064.

By the Court.—The judgment is affirmed.

KOLASINSKI, Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

September 13—October 3, 1916.

Master and servant: Negligence: Injuries: Simple tools: Federal and state statutes: Safety of working place: Special verdict: Immaterial questions: Instructions to jury: Harmless errors.

1. A hammer or maul, the breaking of which resulted in injury to an employee, is *held* upon the evidence in this case to have been a simple tool which the employer was not bound, in the exercise of ordinary care, to inspect or test; and the evidence is further *held* to sustain a finding by the jury that the defect in said handle was not observable by the exercise of ordinary care.
2. Where an action for injuries to a railway employee is governed by the federal Employers' Liability Act, the safe-place rule under the state statute is inapplicable.
3. Where in an action for injuries to an employee the absence of actionable negligence on the defendant's part is established by the evidence and verdict, questions of the special verdict relating to proximate cause and to damages are immaterial, and errors in the submission of such questions or in the instructions relating thereto are not prejudicial to plaintiff.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was brought to recover damages resulting from personal injuries sustained by plaintiff's intestate while in the employ of the defendant and for damages sustained by plaintiff because of the death of her husband which resulted from such injuries. The injuries causing death were occasioned by a hammer or maul head striking deceased while being used by another employee of defendant. The case was tried to the court and a jury and a special verdict returned. Upon the established facts the court below ordered judgment dismissing the complaint upon the merits with costs.

Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

For the respondent there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Killilea.*

KERWIN, J. 1. It is established by the verdict that the plaintiff's husband was injured while in the employ of the defendant in interstate commerce; that the death of plaintiff's husband resulted in part by reason of the injuries sustained while in the employ of the defendant; that the defendant was not negligent in failing to provide plaintiff's husband with a reasonably safe place to perform his work, considering the nature of the work in hand; that there was a defect in the handle of the maul; that the defect in said handle was not one observable by the exercise of ordinary care; that the defendant was not negligent in permitting the use of said maul at the time deceased was injured; that the injuries sustained by deceased did not result in whole or in part from the negligence of any employee of the defendant

in using said maul; and that the deceased was not guilty of any want of ordinary care which proximately contributed to his injury. The foregoing findings are well supported by the evidence.

2. Error is assigned on the following instruction:

"In reference to your answer to the ninth question, I charge you that the hammer handle in question which broke is what in law is termed a 'simple tool' and that the defendant was not bound, in the exercise of ordinary care, to inspect or test said handle."

There was no error in giving this instruction. The undisputed evidence shows that the hammer or maul was a simple tool, therefore there was no duty upon the part of defendant to inspect. *Badger v. Janesville C. Mills,* 95 Wis. 599, 70 N. W. 687; *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841; *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419; *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059. Moreover, the jury found upon sufficient evidence that the defect in the handle of said maul was not observable by the exercise of ordinary care.

Counsel for appellant also invokes the safe-place doctrine under the state statute, but since the case is one falling under the federal act the state statute is not applicable.

Error is also assigned on the submission of questions 2, 3, and 4 of the special verdict. Questions 2 and 3 do not relate to negligence of the defendant, but to the question of damages, and since no actionable negligence was shown they are immaterial. Question 4, which inquired whether the death of the plaintiff's husband resulted in whole or in part by reason of the injuries, was also immaterial.

Error is assigned on the instruction relating to the burden of proof on the question whether the injuries were the proximate cause of deceased contracting diphtheria. Since the answer to this question was immaterial the instruction was not prejudicial.

Some other errors are assigned which are wholly unnecessary to consider and immaterial in view of the fact that no negligence was shown on the part of the defendant.

By the Court.—The judgment is affirmed.

WINNEK, Appellant, vs. MOORE, Respondent.
SCHWEINLER, Appellant, vs. MOORE, Respondent.

September 14—October 3, 1916.

Actions: Consolidation: Fraud: False representations.

1. Two actions against the same defendant growing out of alleged fraud in the sale of a contract to the plaintiffs and depending upon substantially the same evidence were properly consolidated by the court, each plaintiff being permitted to introduce any relevant and competent evidence.
2. False representations as to the cost of a contract granting the right to sell certain articles and as to the profits which had been made in the business, made by defendant to induce plaintiffs to buy such contract from him, were material representations of fact and actionable.

APPEALS from judgments of the circuit court for Milwaukee county: E. B. BELDEN, Judge. *Reversed.*

Actions to recover damages for alleged fraudulent representations made in the sale to plaintiffs of a contract granting the right to sell certain washers and other domestic utilities. At the close of the testimony in the case of *Winnek* the two actions were by order of court consolidated and *Schweinler* was permitted to introduce such additional evidence as he might desire. When all the evidence was in, the court directed a verdict in each case in favor of the defendant, and the plaintiffs appealed.

For the appellants there was a brief by *Samuel Wright* and *Paul D. Durant,* and oral argument by *Mr. Durant.*

For the respondent there was a brief by *Alexander & Burke,* attorneys, and *William E. Burke,* of counsel, and oral argument by *W. E. Burke.*

Vinje, J. The court properly consolidated the two actions. They grew out of the same transactions and depended upon substantially the same evidence. Each plaintiff was permitted to introduce any relevant and competent testimony bearing upon the issue made by the pleadings.

It appears that the defendant, prior to the sale of the contract to and partnership agreement with the plaintiffs, had been interested with one Guthard and others in the sale of washers and contracts. Guthard claimed to own a contract and a certain number of washers sold to him by the Domestic Utilities Manufacturing Company, a California corporation, which contract authorized him to sell washers and other domestic utilities at certain prices named in the contract in territory not already taken. It also authorized him to sell subcontracts to other agents, who were also authorized to sell subcontracts. In the sale of each contract a certain amount of the profit was to be paid to the owners of the previous contracts and to the Domestic Utilities Manufacturing Company. The contract of Guthard was denominated a $5,000 contract, made out in the name of the Rector Company, and since it was for such a large amount and came directly from the manufacturer it was claimed and represented by the defendant that large profits could be made in selling subcontracts and in sharing the profits therefrom. For the purposes of disposing of the main questions upon which the decision in this case rests it is not necessary to go into further detail as to the utilities sold or the precise detail conditions of the contracts.

The Guthard contract was in escrow, pledged for certain indebtedness, and plaintiffs both testify that defendant represented to them that it would require $3,000 to get the contract

out of escrow and that it could not be bought for less; that he had an option to purchase it at that price. This is the substance and effect of their testimony. They further testified that the defendant told them that if they would each pay him $1,500, making $3,000 in all—the amount necessary to purchase the contract,—he would put $1,000 of his own money into a bank to the credit of the partnership to be formed by the three parties, to be used in prosecuting the business. There is evidence in the case to sustain a finding that it cost defendant less than $2,000 to purchase the contract; and the evidence shows without conflict that he took $1,000 out of the $3,000 paid him by the plaintiffs and put it into the bank to the credit of the new partnership.

The plaintiffs also testified that defendant told them he had been in business only a little while and had made $1,500 and that the Guthard Company had made $3,800 since establishing their business in Milwaukee. The evidence does not tend to sustain the truth of such statements. Indeed, it is quite clear therefrom that no such profits were made either by defendant or the Guthard Company.

The representations referred to, both as to the cost of the contract and the profits that had been made in the business, were material representations of fact, and if made and untrue were actionable. *Woteshek v. Neuman,* 151 Wis. 365, 138 N. W. 1000; *Baker v. Becker,* 153 Wis. 369, 141 N. W. 304; *Westra v. Roberts,* 156 Wis. 230, 145 N. W. 773; *Rogers v. Rosenfeld,* 158 Wis. 285, 149 N. W. 33. It was therefore error to direct a verdict for the defendant. The court should have submitted the case to the jury under proper instructions. We have not gone into the details of the case or discussed all the representations claimed to be material and false because if there is another trial the court will no doubt properly instruct the jury as to what are actionable misrepresentations. The evidence is so full of rose-colored opin-

ions and predictions on the part of the defendant as to the profits to be made out of the business that it is not surprising that the actual misrepresentations as to facts testified to were overlooked by the trial court in granting the motion for a directed verdict.

By the Court.—Judgments reversed, and causes remanded for a new trial.

State ex rel. Wisconsin Trust Company and others, Appellants, vs. Widule, County Clerk, etc., Respondent.

September 14—October 3, 1916.

Taxation of incomes: Dividends and interest received by resident trustee for benefit of nonresident: Statutes construed: Constitutional law.

1. The word "income" as used in sec. 1, art. VIII, Const., means the profit or gain derived from capital or labor or from both combined.
2. Under secs. 1087*m*—2, 1087*m*—10, Stats. 1913, dividends derived from stocks and interest derived from notes, mortgages, etc., received by a resident trustee (individual or corporate) as a gain or profit from securities constituting the trust fund were taxable as income in this state, even though the person entitled to the enjoyment thereof and to whom they must be paid over was a nonresident and also a co-trustee, and even though two of the three trustees resided without the state.
3. The resident trustee, in such a case, in whose custody the securities were and to whom the dividends and interest were paid, must, in view of sub. 5, sec. 1087*m*—10, be deemed the "recipient" of such income, within the meaning of sub. 3, sec. 1087*m*—2.
4. The taxation of such income in this state is within the constitutional power of the legislature, and no contract obligation is thereby impaired.

Appeal from a judgment of the circuit court for Milwaukee county: Oscar M. Fritz, Circuit Judge. *Affirmed.*

Certiorari brought to review the action of the assessor of incomes for Milwaukee county in levying the tax in question, the assessment having been confirmed by the county board of review and by the Wisconsin state tax commission. Judgment was rendered in the circuit court affirming the assessment, and from the judgment this appeal is taken by the Wisconsin trustee, who claims that the fund was not assessable in the state of Wisconsin as income.

The material facts are as follows: Nathan Hamburger, a resident of Milwaukee county, Wisconsin, died testate September 15, 1910. He left a will which was duly admitted to probate in the county court of Milwaukee county. Jacob Gimbel, named in the will as executor, declined to act. *Ellis A. Gimbel* was appointed as executor and trustee in his stead and at all times resided within the state of Pennsylvania. The widow of Hamburger remarried and is now known as *Bertha H. Behal,* and during the year 1913 resided in the state of Pennsylvania. The *Wisconsin Trust Company* is a Wisconsin corporation having its principal office at Milwaukee, Wisconsin. The three persons last named were the executors of the will and subsequently qualified as trustees under the will.

By articles III, IV, V, VII, VIII, IX, and X of the will there was given to the executors in trust a specific number of shares of stock in a Pennsylvania corporation, Gimbel Brothers, Incorporated, and it is provided that such shares of stock or their proceeds in case of sale are to be held in trust and administered for the beneficiaries named. By other articles of the will, VI, XI, XII, XIII, and XIV, are given money bequests, and by article XV certain specific personal property is bequeathed. By article XVI a trust for the benefit of the widow *Bertha H. Hamburger* (now *Behal*) is created, and this article so far as material here is as follows:

"All the rest, residue and remainder of my property and estate of whatever kind and nature and wherever situated,

real, personal and mixed, which I may own at the time of my death, I give, devise and bequeath to my said executors, in trust, upon the trust that they hold and invest the same and pay the net income thereof to my beloved wife *Bertha Hamburger,* for her own sole use and benefit so long as she may live, and subject only to this bequest in trust for and during the life of my said wife, the principal of this bequest is given, devised and bequeathed to my wife, to become her sole and separate estate to be disposed of by her, by will or otherwise; and if she do not so dispose of it, to become upon her death part of her intestate estate; and the gift, devise and bequest made to my said wife in this will are in lieu of dower and other claim against my estate which my wife might have in the absence of this will; . . ."

The executors are given full power and authority to manage the property and to invest and reinvest the same so as to yield a safe and reasonable income, except, however, that they are to invest moneys realized from the estate only in such interest-bearing securities as may lawfully be acquired for the purpose of the investment of trust funds in the hands of trustees according to the laws of the state of Wisconsin. The trustees are also given power and authority to sell the stock owned by the said testator at the time of his death in Gimbel Brothers, Incorporated, which constitutes the major portion of the trust fund, upon certain terms and conditions mentioned in said will. It is further provided by the will that if the *Wisconsin Trust Company* refuses to act, another trust company in the state of Wisconsin be appointed as one of the trustees, and it also provides for the filling of vacancies among the trustees by the county court of Milwaukee county or the court succeeding to its jurisdiction.

The estate was fully probated and assigned to the trustees under the will. The securities belonging to the estate were in the custody of the *Wisconsin Trust Company* at its office in the city of Milwaukee during the year 1913, where the dividends and interest accruing were paid. In February,

1914, the *Wisconsin Trust Company* made a return, for and on behalf of all of the trustees, of the dividends and interest received by it from the trust property above mentioned to the income tax assessor, as follows: (1) Dividends on stock owned by said trustee in Gimbel Brothers, Incorporated, a corporation organized under the laws of the state of Pennsylvania, but doing business in the states of Wisconsin and Pennsylvania, amounting to $42,652.50; (2) dividends from the Provident Loan Society, Milwaukee, Wisconsin, amounting to $22.50; (3) interest on notes given for the purchase price of certain assets of the estate which were purchased by the trustee of the estate of said Nathan Hamburger, which amounted to $7,269.92; (4) interest on money deposited with the Wisconsin National Bank. Certain real estate located in the state of Pennsylvania is included in the trust, but the amount derived therefrom was not included as income in the present assessment. An apportionment was made by the tax commission under sub. 3, sec. 1087*m*—2, Stats., of the business done and earnings of Gimbel Brothers, Incorporated, in Wisconsin, the correctness of which was admitted by all parties in interest. The assessor of incomes, after allowance of deductions and exemptions, made an assessment against the *Wisconsin Trust Company,* the resident trustee, in the sum of $39,140, which was thereafter approved by the income tax board of review for Milwaukee county, and upon proceedings properly had was also approved by the Wisconsin state tax commission.

For the appellants there were briefs signed by *Glicksman, Gold & Corrigan,* attorneys, and oral argument by *Nathan Glicksman.*

For the respondent there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, *Winfred C. Zabel,* district attorney for Milwaukee county, and *William L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys; and the cause was argued orally by *Mr. Brossard.*

Rosenberry, J. The provisions of the Income Tax Act so far as applicable here are as follows:

"Section 1087*m*—1. There shall be assessed, levied, collected and paid a tax upon incomes received during the year ending December 31, 1911, and upon incomes received annually thereafter, by such persons and from such sources as hereinafter described; . . ."

"Section 1087*m*—2. 1. The term 'person,' as used in this act, shall mean and include any individual, firm, copartnership, and every corporation, joint stock company or association organized for profit, and having a capital stock represented by shares, unless otherwise expressly stated.

"2. The term 'income,' as used in this act, shall include: . . .

"(b) All dividends derived from stocks and all interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever. . . .

"3. The tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state. In determining taxable income, rentals, royalties, and gains or profit from the operation of any farm, mine, or quarry shall follow the situs of the property from which derived, and income from personal service and from land contracts, mortgages, stocks, bonds and securities shall follow the residence of the recipient. . . ."

"Section 1087*m*—10. . . . 5. Every guardian, trustee, executor, administrator, agent or receiver, and every other person or corporation acting in a fiduciary capacity shall make and render to the assessor of incomes of the district in which such representative resides, a verified list or return of the amount of income received by him for such person, ward or beneficiary together with all income received by the ward, beneficiary, deceased or incompetent person whom he represents or succeeds during the year covered by the return and shall be liable to assessment and taxation therefor, subject to the deductions and exemptions provided in this chapter; provided, that such deductions or exemptions have not been

claimed by or for such person, ward or beneficiary in another capacity. The return so made shall be signed by the person rendering it, and by the president or secretary thereof, if a corporation. Every person subject to an income tax in his representative capacity under this subdivision shall have all of the remedies and rights of reimbursement for any tax assessed against or paid by him in such capacity prescribed by section 1044*a* of the statutes."

The *Wisconsin Trust Company* is a person as defined by the statutes. The fund for which it was assessed is dividends derived from stocks and interest derived from money loaned or invested in notes, credits, bonds, or other evidence of debt. The fund was received by the *Wisconsin Trust Company* as trustee at its office within the state of Wisconsin.

Restatement and argument cannot make plainer the fact that the legislature intended that funds of this character should be taxed as income in the hands of trustees residing within this state.

Has the legislature the constitutional power to tax a fund such as the one in question as income?

Sec. 1 of art. VIII of the constitution is as follows:

"The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."

The word "income" as used in the constitution has been defined as the profit or gain derived from capital or labor or from both combined. *State ex rel. Bundy v. Nygaard,* 163 Wis. 307, 158 N. W. 87; *Van Dyke v. Milwaukee,* 159 Wis. 460, 150 N. W. 509; *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164; *State ex rel. Manitowoc Gas Co. v. Wis. Tax Comm.* 161 Wis. 111, 152 N. W. 848, and cases cited.

The fact that in the present case the fund in question must be paid to the person entitled to enjoy it, that that person re-

sides without the state and is a co-trustee, and that two of the co-trustees reside without the state of Wisconsin, does not work a change in the character of the fund itself in the hands of the Wisconsin trustee, and it is a gain or profit derived from the securities constituting the trust fund and hence income, and is subject to taxation as income.

Much might be said both for and against the legislative policy involved, but with that this court has nothing to do. The legislative intent is clear and the act is within the constitutional power of the legislature, and the assessment, therefore, was a lawful one.

It may be noted that the testator used the word "income" in his will in the same sense that the word is used in the constitution, meaning thereby the gain or profit coming into the hands of the trustees from the property devised and bequeathed to them. This perhaps is not very material except that it shows that the meaning of the word as defined by the court is the common ordinary meaning given to the word in everyday life.

Under the provisions of sub. 5, sec. 1087*m*—10, Stats. 1913, which specially provides that all income received by guardians, trustees, executors, administrators, agents, or receivers shall be subject to assessment and taxation, we must hold that the *Wisconsin Trust Company,* under the facts of this case, was the "recipient" within the meaning of sub. 3 of sec. 1087*m*—2.

The rule laid down in *State Tax on Foreign-held Bonds,* 15 Wall. 300, and *Union R. T. Co. v. Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, does not apply, for the reason that no contract is impaired, neither is any person deprived of property without due process of law. A tax on income seems to be expressly reserved in the opinion of the court in the last case. Speaking of tangible personal property, the court says:

"It is not only beyond the sovereignty of the taxing state, but does not and cannot receive protection under its laws.

True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the state with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived." Page 204.

No contract obligation is in any way impaired. The *Trust Company* will pay the net income in accordance with the terms of the will, which will be the amount remaining after the payment of the tax and other necessary administrative expenses.

We conclude, therefore, that the fund was taxable as income under the provisions of the Income Tax Act and that the act is a valid exercise of legislative power and the assessment was lawfully made.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

KUTSCHENREUTER, Respondent, vs. PROVIDENCE WASHINGTON INSURANCE COMPANY, Appellant.

September 14—October 3, 1916.

Insurance: Proof of loss: Waiver: Denial of liability.

An absolute denial of liability by an insurance company within the time limited for the furnishing of proof of loss renders that act unnecessary, even though the policy provides that failure to furnish such proof shall render the claim void.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Plaintiff sued on an insurance policy which provided for payment of any loss only after a sworn statement of the loss furnished to the company by the assured within sixty days

after the loss, and further that failure to render such statement should render the claim void.

The complaint, after fully setting forth the issuance of the policy and the loss, alleged the giving of notice of the loss, but not the sworn statement, and further alleged in substance that the company, through its agents, within eight days after the loss, denied liability under the policy and about ten days later declined to further communicate with the plaintiff.

A general demurrer to the complaint was overruled and the defendant appeals.

For the appellant the cause was submitted on the brief of *Gill & Barry.*

G. J. Davelaar, for the respondent.

Winslow, C. J. It is held in this case:

1. Under an insurance policy requiring the furnishing of a sworn statement by the assured as a condition precedent to the payment of loss, an absolute denial of liability by the company within the time limited for the furnishing of the statement renders that act unnecessary. *McBride v. Republic F. Ins. Co.* 30 Wis. 562; *Lingelbach v. Theresa Village Mut. F. Ins. Co.* 154 Wis. 595, 143 N. W. 688.

2. An additional clause in such a policy making the claim void in case the sworn statement is not furnished adds nothing substantial to the policy so far as the furnishing of the statement is concerned. A claim that cannot be collected is, in every practical sense, a void claim. Hence the absolute denial of liability alleged in the complaint in the present case, if proven, will excuse the failure to furnish the sworn statement.

By the Court.—Order affirmed.

Eschweiler, J., took no part.

MECHANICAL APPLIANCE COMPANY, Appellant, vs. A. KIECKHEFER ELEVATOR COMPANY, Respondent.

September 14—October 3, 1916.

Appeal: Review: Presumptions: Findings of fact: Milwaukee civil court: Reversal of judgment: Effect.

1. In reviewing on appeal the result of a trial, the presumption that the original jurisdiction applied correct rules of law should prevail unless the contrary clearly appears.
2. Findings of fact by a trial court are, in general, to be deemed verities on appeal unless they satisfactorily appear to be contrary to the clear preponderance of the evidence.
3. In determining whether findings of fact are contrary to the clear preponderance of the evidence, regard should be had to the superior advantages which a trial court has for determining the weight of evidence.
4. The rule as to necessity of a clear preponderance of the evidence against findings of fact to warrant disturbing them, does not apply if it satisfactorily appears that some error of law efficiently influenced the result.
5. In considering, on appeal, whether the trial jurisdiction efficiently erred as to any matter of law or fact, the result in such jurisdiction should not be disturbed unless clearly wrong.
6. The foregoing rules are applicable to appeals to the circuit court from the Milwaukee civil court.
7. An order of the circuit court unqualifiedly reversing a judgment of the Milwaukee civil court and granting a new trial on all issues necessarily vacates all the findings of the civil court.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The action was commenced in the civil court of Milwaukee county. It was to recover on contract for the sale price of a K7B 7½ HP. rotor sold defendant at $40.50, a K8A 5 HP. rotor sold defendant at $54, and $23.29 for repairing a K9 rotor. The complaint was in the usual form.

The defendant answered that the claim for $23.29 was for work and material to make the appliance referred to comply with the warranty upon which it was sold to defendant; that

the claim of $40.50 was for a rotor delivered to defendant for the purpose of making an electric motor, sold by it to plaintiff, comply with the warranty thereof, and that the claim of $54 was for a rotor received by defendant which it did not in any way agree to pay for and for which it did not become indebted; and counterclaimed, in due form, for $794.98 for breaches of warranty.

Reply was duly made, putting in issue the allegations of the counterclaims and pleading a settlement in respect thereto.

The cause was tried by the court, resulting in findings of fact and conclusions of law to the effect that plaintiff was entitled to judgment as claimed. Judgment was entered in plaintiff's favor according to such findings and conclusions.

Appropriate exceptions were filed and the cause was duly carried by appeal, in defendant's behalf, to the circuit court.

The appellate court entered an order reversing the judgment and granting a new trial, specifying in an accompanying opinion, reasons therefor.

Plaintiff duly excepted to the order.

Robert R. Freeman, for the appellant.

For the respondent there was a brief by *Doe, Ballhorn & Doe,* attorneys, and *Harold M. Wilkie,* of counsel, and oral argument by *Mr. Wilkie* and *Mr. Joseph B. Doe.*

Marshall, J. Principles which are quite familiar rule this case. They have been so frequently stated and applied, it would seem a useless repetition to do it anew, if it were not for evidence, now and then, either that they are not always kept in mind in determining upon the advisability of an appeal, or the force which the court, in the interest of justice to litigants and the public, has been accustomed to give them, is not always appreciated. From the viewpoint suggested, we are constrained to make this restatement.

A court, in reviewing, on appeal, the result of a trial, should

presume that the original jurisdiction applied correct rules of law, and that should prevail unless the contrary clearly appears. This applies in case of an appeal to the circuit court with the same force as an appeal to this court.

Findings of fact made by a trial court, are, in general, to be deemed verities on appeal unless they satisfactorily appear to be contrary to the clear preponderance of the evidence, and that applies to trials in the civil court of Milwaukee county. *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 146 N. W. 879; *Keck v. Michigan Q. S. Co.* 158 Wis. 500, 149 N. W. 208.

In determining whether findings of fact are contrary to the clear preponderance of the evidence, regard should be had to the superior advantages which a trial court has for determining the weight of evidence.

The rule as to necessity of a clear preponderance of the evidence against findings of fact to warrant disturbing them, does not apply if it satisfactorily appears that some error of law efficiently influenced the result.

In considering, on appeal to this or any court, whether the trial jurisdiction efficiently erred as to any matter of law or fact, the result in such jurisdiction should not be disturbed unless clearly wrong. *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Adlington v. Viroqua,* 155 Wis. 472, 144 N. W. 1130; *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30.

Counsel for appellant,—appreciating a clear preponderance of the evidence against the findings of the civil court, in this case, was essential to warrant the order complained of, but not, perhaps, the degree of certainty required that the circuit court did not apply that test and did not correctly determine the matter,—contends that such test was not applied, and that, in any event, the determination was erroneous. It is suggested, and not without some reason, that the material findings as to the counterclaims were not set aside and that the new trial

was granted as matter within the sound discretion of the circuit judge and not as a matter of right, having regard to the principles above stated, applicable to the situation.

We must confess that the language used by the trial judge in stating reasons for the conclusion reached, is somewhat ambiguous, but, indulging in the presumptions in favor of the decision which must be applied thereto, and giving to the court's language the reasonable construction it will bear, against error, we come quite short of being able to conclude, either that the court, clearly, did not determine that the civil court's findings of fact were against the clear preponderance of the evidence, or that it did set them aside and on that ground. The order unqualifiedly reversed the judgment of the civil court and granted a new trial on all issues. The necessary effect of that was to vacate the findings. The language of the opinion, filed, fairly construed in the light of the entire situation, is in harmony therewith. It is not thought advisable to extend this opinion by embodying such language herein and pointing out the features which persuade us to the conclusion we have reached.

In solving the question of whether the circuit court erred in holding that the civil court's findings are contrary to the clear preponderance of the evidence, the reasons in that regard which have been urged upon our attention by counsel for appellant have been considered. Following the practice of not, other than in exceptional cases, quoting and discussing the evidence as to such a question, where a conclusion has been reached that the judgment must be affirmed, that course will be taken here. No efficient reason seems to exist for reversing the circuit court's decision.

By the Court.—The order is affirmed.

Eschweiler, J., took no part.

STATE EX REL. PABST BREWING COMPANY, Respondent, vs. KOTECKI, City Comptroller, Appellant.

September 15—October 3, 1916.

Appeal from order: Stay of proceedings: Mandamus: *Interlocutory judgment: City comptroller: Refusal to countersign warrant.*

1. An order refusing to quash a writ of *mandamus*, overruling a demurrer to the relation, and giving the defendant time to plead over, is such an order as is contemplated by sec. 3060, Stats., and an appeal therefrom does not operate to stay proceedings except as provided in said section.
2. Sec. 925—269*m*, Stats.,—exempting city officers, in actions against them in their official capacity, from giving bonds on appeal,—does not operate to stay proceedings pending an appeal in such an action unless a stay is specifically ordered by the court.
3. Where, pending an appeal from an order overruling a demurrer to the relation and refusing to quash the alternative writ, in a *mandamus* proceeding to compel the city comptroller of Milwaukee to countersign a warrant for the refund of excessive taxes, the circuit court entered an interlocutory judgment awarding the peremptory writ and commanding the comptroller to countersign the warrant, sec. 925—260*m*, Stats., did not authorize the comptroller to refuse to do so, even though he was advised by the city attorney that a doubt existed as to the legality of the relator's claim.
4. Nor would such a refusal be justified by any desire of the city to plead as a defense in the action that the relator had unlawfully concealed assessable property from the assessors and hence was not entitled to recover the unlawful taxes paid.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is a *mandamus* action to compel the city comptroller of the city of Milwaukee to countersign a warrant for the refund of an excessive personal property tax.

A demurrer was interposed to the writ and an order was entered by the circuit court overruling the demurrer and refusing to quash the writ. The defendant took an appeal from this order to the supreme court, and upon hearing here

the order was approved. While that appeal was pending in the supreme court the circuit court proceeded in the action and entered an interlocutory judgment commanding the defendant to audit the resolution of the common council allowing plaintiff's claim for the refund of the excessive tax and to countersign a city warrant for the amount of such refund. There is no return to the alternative writ other than the affidavit of Clifton Williams, as city attorney, filed in opposition to the court's order to show cause why the defendant should not forthwith do the things commanded by the alternative writ and in default thereof be proceeded against for contempt. The circuit court by order of January 10, 1916, held this affidavit to be a return to the alternative writ and allowed the petitioner twenty days from such date to plead to such return.

On February 2, 1916, plaintiff served notice on the city attorney that it would move for a peremptory writ on the record on February 12th. On February 26, 1916, the court made an order directing that the peremptory writ issue, and on February 29, 1916, the court further ordered that an interlocutory judgment be entered adjudging that the peremptory writ of *mandamus* issue and reserving for future adjudication the amount of the damages and costs to which petitioner is entitled and against whom the relator shall recover such costs and damages, and that the city of Milwaukee be summoned and served with a copy of the return and such order and that the city have twenty days to answer. An interlocutory judgment was entered on February 29, 1916, awarding the peremptory writ, commanding the defendant to audit the resolution of the common council and to countersign a warrant for the refund of the excessive tax paid by plaintiff, and that the questions of the liability for damages and for costs in the action be reserved for future determination in a final judgment. This appeal is taken from such interlocutory judgment.

Clifton Williams, city attorney, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *W. C. Quarles,* of counsel, and oral argument by *W. C. Quarles.*

SIEBECKER, J. The former appeal in this action to the supreme court was from an order overruling a demurrer and refusing to quash the writ of *mandamus* which commanded defendant as city comptroller to audit a resolution of the common council and countersign a warrant for the return of an excess personal property tax paid by plaintiff under an alleged mistake. The facts of the case involved in the appeal are fully stated in the report of the case and the decision of this court in 163 Wis. 101, 157 N. W. 559. The record before us discloses no facts on the merits of the controversy in addition to those before the court on the former appeal. The inquiry now presented is, Was the circuit court justified in proceeding in the action in circuit court during the time the case was pending in the supreme court on such former appeal? The order embraced in the former appeal denied defendant's motion to quash the writ and his demurrer thereto, and further ordered "that defendant have twenty days within which to plead over to the said relation and alternative writ of *mandamus.*" This is manifestly such an order as is contemplated by sec. 3060, Stats., providing that an appeal from such an order does not delay performance thereof or obedience thereto, except upon compliance with such condition as the court directs, the execution of an undertaking as required by said section, and that "no appeal from an intermediate order before judgment shall stay proceedings unless the court or the presiding judge thereof shall, in his discretion, so specially order." An appeal from an order overruling a demurrer does not stay proceedings without an order of the court. *Noonan v. Orton,* 30 Wis. 356; *Douglas Co. v. Walbridge,* 36 Wis. 643. Neither the circuit court nor

judge thereof made, as specified in this section, any direction or order to delay performance thereof or obedience thereto or any special order to stay proceedings in the case pending the appeal to this court.

The defendant contends, however, that he is relieved from procuring such action of the court to effect a stay of proceedings by sec. 925—269*m*, Stats. (ch. 452, Laws 1913), providing: "No officer of any city, no matter how organized, shall be required to file an undertaking or any other bond required on appeal in any court when such party has been sued in his official capacity, except in actions of *quo warranto* . . ., nor shall any city officer be liable for any costs or damages, but costs or damages, if any, shall be awarded against the city." The claim that this statute operates automatically to delay performance of the order and to stay proceedings in the action without being specially ordered by the court or judge during the pendency of the appeal in this court from the original order overruling the demurrer is not borne out by its provisions. The statute at most provides that a city officer, when sued in his official capacity, is relieved from filing an undertaking or bond required of parties to effect an appeal to this court; but there is nothing in the statute indicating that the proceedings shall be stayed without an order of the court specifically directing a stay as required by statute in all other actions, and no such order was made in this case.

It is also contended that the provisions of sec. 925—260*m*, Stats., to the effect that an official of any city authorized to countersign city warrants or resolutions for the expenditure of money may refuse to do so if informed in writing by the city attorney that doubt exists in regard to the legality of such expenditure until such matter is determined by the courts, operate to excuse the comptroller from abiding by the determination of the court during the pendency of the appeal. The record shows that the defendant was informed in writing by the city attorney that a doubt existed in regard

to the legality of plaintiff's claim. Manifestly under this statute the comptroller was authorized to refuse to countersign the resolution and warrant until the matter had been determined by the courts; but when a court had so determined, its proceedings were not to be stayed in carrying its adjudication into effect by authority so conferred on the city attorney and comptroller, nor can such authority be employed to defy any action of the court within its jurisdiction in dealing with the matter. Such an interpretation of the statute as defendant claims would lead to the absurdities of exempting the comptroller from obeying the lawful commands of courts in the course of a legal proceeding under the law. There is nothing in the statute indicating that the legislature intended to exempt defendant from the provisions of sec. 3060, Stats.

An examination of the record discloses nothing to warrant this court in reversing the judgment appealed from. It is suggested in argument that the city might desire to plead as a defense that plaintiff unlawfully concealed assessable property from the city assessors and hence is not entitled to recover the unlawful tax it paid which is here in question. If any of relator's property was discovered which had been omitted from the assessment roll, it was the assessing officer's duty under the statute to reassess the property within the same year, and, if this could not be done, it should have been entered on the roll once additional for each of the previous years of such omission. It is apparent that the city, under the statute, was fully empowered to reach property omitted from assessment. There is no error in the proceeding of the circuit court.

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. ZABEL, Respondent, vs. GREFIG, imp., Appellant.

September 15—October 3, 1916.

Nuisances: Bawdy houses: Abatement: Temporary injunction: Closing of house for one year: Constitutional law.

1. Property used for purposes of lewdness, assignation, or prostitution is a nuisance, and in an action under secs. 3185*b* to 3185*h*, Stats., upon a satisfactory showing of such use, a temporary injunction may be granted.

[2. Whether the provision of sec. 3185*f*, Stats., to the effect that the building or place where such a nuisance is carried on may be closed for one year is constitutional, is not determined.]

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This action was brought to abate a nuisance and restrain the continuance thereof. It is alleged in the complaint that a certain hotel in the city of Milwaukee, Wisconsin, was used for the purpose of lewdness, assignation, and prostitution.

A motion for temporary injunction was made to restrain the defendants, pending the action, from continuing, maintaining, or permitting the use of the premises described in the complaint for the purpose of lewdness, assignation, and prostitution. Several affidavits were used on the motion for the temporary injunction in support of the allegations of the complaint. On the motion the court made the following restraining order:

"It is ordered that the defendants, their attorneys, agents, servants, lessees, and all other persons whatsoever do absolutely desist and refrain from:

"1. Maintaining or permitting in, or leasing for or using for lewdness, prostitution, or assignation, the whole or any portion of the building described by street number as 379 Third street, in the city and county of Milwaukee, state of Wisconsin, consisting of a three-story brick building known as Bismarck Hotel—said building being situated on the prem-

ises more particularly described as the north (N.) forty-three (43) feet of lot nine (9), block thirty-nine (39), in the Second ward in said city, county, and state,—and the furniture, fixtures, musical instruments, and all other contents of said building.

"2. Selling, leasing, or in any way disposing of, or removing from said premises above described the furniture, fixtures, musical instruments, or contents which were in or upon said premises at the time of the commencement of this action, until the conclusion of the trial of this cause and until the further order of the court shall be made herein."

A motion was made to vacate this order and denied.

For the appellant there was a brief by *H. L. Eaton,* attorney, and *Geo. Luebke,* of counsel, and oral argument by *Mr. Eaton.*

Winfred C. Zabel, district attorney, and *Arthur H. Bartelt,* assistant district attorney, for the respondent.

KERWIN, J. It is contended by counsel for appellant that the court erred in granting a temporary injunction. The showing made on the motion was ample to warrant the court in holding that the property in question was being used for lewdness and assignation so as to bring the case within the provisions of secs. 3185*b* to 3185*h,* Stats. These statutes authorize an action similar to the one brought here for the abatement of the nuisance and declare the use of the property in the manner set forth in the complaint a nuisance, and also provide that upon a showing satisfactory to the court a temporary injunction may be granted. It is therefore clear from the complaint that the action was properly brought, and it further appears from the allegations of the complaint, together with the affidavits produced on the motion, that the court was well warranted in making the order appealed from. *State ex rel. Wilcox v. Ryder,* 126 Minn. 95, 147 N. W. 953; *State ex rel. Kern v. Jerome,* 80 Wash. 261, 141 Pac. 753; *State ex rel. Att'y Gen. v. Stoughton Club,* 163 Wis. 362, 158 N. W. 93; *Mugler v. Kansas,* 123 U. S. 623, 8 Sup. Ct. 273;

State ex rel. English v. Fanning, 97 Neb. 224, 147 N. W. 215; *Comm. v. Howe,* 13 Gray (Mass.) 26; *State ex rel. Robertson v. New England F. & C. Co.* 126 Minn. 78, 147 N. W. 951; 1 Wood, Nuisances (3d ed.) § 29; 14 Cyc. 484.

Counsel for appellant contend that no power exists to declare that a nuisance which is not in fact a nuisance.

There is no question under the authorities but that the property used for the purposes which it is alleged to have been used in the complaint in this action is a nuisance; and the proof made on the motion for temporary injunction shows that the property as used was a nuisance under the statutes above referred to.

It is further insisted by counsel for appellant that the provision of sec. 3185*f*, Stats., to the effect that the building or place where the nuisance is carried on may be closed for the period of one year, is unconstitutional. We are not concerned with that provision of the statute on this appeal since the appeal is from the order granting temporary injunction. Whether the closing of the building in question here for the period of one year would be unreasonable and without authority of law is not now before us, and we refrain from expressing any opinion on this point. We are convinced that sufficient grounds were shown for the temporary injunction issued, therefore the order appealed from should not be disturbed.

By the Court.—The order appealed from is affirmed.

FRANKFORT GENERAL INSURANCE COMPANY OF FRANKFORT-ON-THE-MAIN, GERMANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

September 15—October 3, 1916.

(1, 4) Municipal corporations: Streets and alleys: Injury from defect: Notice of injury: Sufficiency. (2) Appeal: Review: Questions of fact: Exceptions. (3) Workmen's compensation: Cause of action against third person: Assignment.

1. Where in an action for injury to a person driving out of an alley to a street, caused by a twelve-inch drop from the edge of the sidewalk to the surface of the street, the city put in evidence a plat showing the exact character of such drop, and there was no claim that the city was misled by any insufficiency in the notice of injury, inaccuracy in describing the place or failure to describe the defect which caused the injury did not render the notice invalid.
2. A finding of fact by the trial court which was not excepted to will not be reviewed on appeal; nor can questions of fact which were not raised or litigated in the trial court be raised for the first time in the supreme court.
3. A cause of action in tort which an injured employee had against another person and which became the property of his employer under sec. 2394—25, Stats., may be assigned by the employer.
4. After an alley had been used for several years and the approach thereto, from the roadway of a street to the lot line, and its condition and use had been acquiesced in and adopted by the city, the city built a sidewalk with longitudinal grooves in its surface and returned the curb to the sidewalk line, thus showing its assent to the continuance of the use of the alley. It left, however, a perpendicular drop of about twelve inches from the edge of the walk to the surface of the street. *Held* that, by so creating a defect within the limits of the street and by failing to restore the alley temporarily to a reasonably safe state for travel, the city made itself liable for an injury, caused by such defect, to a person driving out of the alley, even though it was under no obligation to make a permanent safe approach to the alley.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for personal injury, begun in the civil court of Milwaukee county. On November 21, 1914, one Mike Gadanecz, while in the employ of the Milwaukee Western Fuel Company, was injured while riding in an empty coal wagon driven out of an alley on to Sycamore street in the defendant city. The defendant had laid a concrete sidewalk upon the north side of the street and had left a drop of about one foot on the south side of the sidewalk. As the wheels of the wagon dropped down Gadanecz was precipitated from the seat of the wagon to the ground and was injured.

He received compensation from his employer under the Workmen's Compensation Act and his cause of action thereby became the property of the Milwaukee Western Fuel Company, which duly assigned it to the plaintiff herein. The civil court found for plaintiff, and upon appeal to the circuit court the judgment of the civil court was affirmed and the defendant appealed.

For the appellant there was a brief by *Clifton Williams,* city attorney, and *Eugene L. McIntyre,* first assistant city attorney, and oral argument by *Mr. McIntyre.*

For the respondent there was a brief by *Doe, Ballhorn & Doe,* and oral argument by *J. B. Doe.*

Vinje, J. The defendant claims plaintiff has no cause of action because (1) no notice of injury sufficient to comply with the provisions of sec. 1339, Stats. 1915, was served on the city; (2) Mike Gadanecz at the time of his accident was not performing services arising out of or incidental to his employment and was not upon the premises of his employer; (3) he never made a lawful claim against the Milwaukee Western Fuel Company for compensation; (4) any claim which may have accrued to the Milwaukee Western Fuel Company was not assignable to a third party; and (5) the city breached no duty owed to Mike Gadanecz either in the construction of the sidewalk in question or in failing to provide

a safe approach from Sycamore street to the sidewalk and the alley.

1. The notice served upon the city stated:

"You are hereby notified that on November 21, 1914, the undersigned, Mike Gadanecz, sustained an injury on the north side of Sycamore street at the southerly end of the alley running north from said Sycamore street between Ninth and Tenth streets, the place of injury being between the driveway of said Sycamore street and the lot line on the north side of said Sycamore street. That the said injury was sustained because of the defective and insufficient character of said alley and street, for which injuries, consisting among other things of a broken femur, said Mike Gadanecz holds said city of *Milwaukee* liable in damages."

It is claimed this notice was insufficient because it did not advise the city whether the injury occurred north or south of the sidewalk—the distance between the north line of the six-foot concrete sidewalk and the lot line being three feet six inches, and between the south line of the sidewalk and the curb ten feet three inches. It is further claimed that the notice fails entirely to describe the insufficiency or want of repair that occasioned the injury. The pleadings and proof show that the injury was sustained at the south edge of the sidewalk by a drop of about twelve inches from the sidewalk down to the street or alley. No other defect was in dispute. It appears that the city put in evidence a plat of the *locus in quo* showing in detail the exact character of this drop, and no claim was made during the trial that it was misled by any want of sufficiency of the notice. Such being the case, the notice must be held sufficient under that part of sec. 1339, Stats. 1915, which provides that

"No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repairs which caused the damage for which satisfaction is claimed, provided it shall appear that there was no intention on the part of the person giving such notice to mis-

lead the other party and that such party was not in fact misled thereby."

In the absence of evidence showing that defendant was misled or not sufficiently informed, a liberal construction in favor of validity will be given such notices. *Benson v. Madison,* 101 Wis. 312, 317, 77 N. W. 161, and cases cited.

2. The second and third assignments of error may be disposed of together. The court found:

"That after his said injury said Gadanecz made a lawful claim against his employer, Milwaukee Western Fuel Company, for compensation under the Wisconsin Compensation Law; that both said Gadanecz and said Fuel Company were, at the time, under the provisions of that law; that subsequent to the making of said claim said Fuel Company duly assigned the cause of action belonging to said Gadanecz against said defendant city to the plaintiff in this action, and that said plaintiff is now the lawful owner of said claim and cause of action against said city."

This finding of fact was not excepted to, so the questions presented by these assignments of errors are not before us. Moreover, it appears that these questions were not litigated or raised either in the civil or circuit court. In such a state of the record they cannot be raised for the first time here.

3. The contention that even if the Milwaukee Western Fuel Company became the lawful owner of the cause of action which Mike Gadanecz had against the city it could not assign it to a third party has been negatived by this court. *Lehmann v. Farwell,* 95 Wis. 185, 70 N. W. 170; *McGarvey v. Independent O. & G. Co.* 156 Wis. 580, 146 N. W. 895; *Saudek v. Milwaukee E. R. & L. Co.* 163 Wis. 109, 157 N. W. 579.

4. Upon the issue of defendant's negligence in leaving a drop of twelve inches from the south edge of the sidewalk to the alley or street the trial court found:

"That said alley or driveway had been used for a period of four years and more prior to November 21, 1914, by various persons, in driving between Sycamore street and Grand avenue, for the purpose of making deliveries of merchandise to

said Aberdeen Hotel and to persons living on the premises fronting on the north side of Sycamore street and adjacent to said alley, and for other purposes, and that the approach to said alley from the roadway on Sycamore street to the north line of said street and its condition and its use had been acquiesced in and adopted by the city before the construction of said sidewalk in 1910."

The finding is sustained by the evidence, and it appears moreover that the city returned the curb to the sidewalk line and made longitudinal grooves in the concrete sidewalk across the alley, thus showing its assent to the continuance of the use of the alley. It may be conceded for the purpose of this case that the city was under no obligation to make a permanent safe approach by pavement or otherwise to this alley. The question is, Could it lawfully, by the building of the new sidewalk, render the crossing unsafe and leave it so, thus making a trap for travelers thereon? We deem not. It became its duty to make the crossing temporarily and reasonably safe by a sufficient fill of earth or other material. In failing to do this it breached a duty it owed to the travelers thereon.

Counsel for the defendant relies upon the cases of *Bishop v. Centralia,* 49 Wis. 669, 6 N. W. 353; *Houfe v. Fulton,* 34 Wis. 608; and *Curtiss v. Bovina,* 138 Wis. 660, 120 N. W. 401, as negativing liability on the part of the city. In each of those cases it was found that the injury occurred outside the limits of a lawfully laid out highway. Here the injury occurred within the limits of Sycamore street and was the result of the positive acts of the city. Whether it would have been liable for a defect due to a mere want of repair at the place of injury is a question that need not be decided. Its liability is placed upon the ground that it failed to temporarily restore the alley to a reasonably safe state for travel after creating the defect by the laying of the sidewalk. The rule invoked by defendant's counsel, that it is not the duty of a municipality to keep its highways safe for travel throughout their whole width, has no application to the present situation.

By the Court.—Judgment affirmed.

SEIBOLD, Respondent, vs. WAHL and another, Appellants.

September 15—October 3, 1916.

Elections: Right of students to vote: Residence, how determined: Emancipation: Intention: Temporary purpose.

1. Attendance at an institution of learning for the sole purpose of acquiring an education is not of itself sufficient to establish the student's residence at that place so as to entitle him to vote there.
2. In such a case much weight is to be given to the fact as to whether or not the student is emancipated from his family in the matter of looking to them for a home or a place to which to return or for means of support.
3. A student who registered at the state university from another place in the state, where his parents reside and to which place he returns in his vacations, and who is dependent, in part at least, upon that home for his support, was not entitled to vote in Madison, his attendance at the university being for a "temporary purpose merely," within the meaning of sub. 3, sec. 6.51, Stats. 1915, and his removal to Madison being "without intention to acquire a new residence," within the meaning of sub. 9 of that section.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from an order overruling a demurrer to the complaint.

In this case, as in the cases decided herewith of John Gross, Albert Asbahr, and Randolph L. Wadsworth, plaintiffs respectively against the same defendants, the plaintiffs, each over twenty-one years of age, unmarried, owning no property and paying no taxes to the city of Madison, and students of the University of Wisconsin, at Madison, presented themselves as intending voters at the primary election held in the city of Madison March 21, 1916, before the defendants, inspectors of election. Each was examined, as required, by the defendants, and upon their respective statements the defendants refused to permit each of them to vote

at such election. Thereupon each commenced an action in the circuit court for Dane county against the defendants to recover damages for such refusal. The respective complaints embody substantially the examination each plaintiff was subjected to by defendants and upon which the right to vote was denied. Demurrers to the respective complaints were interposed, and upon the rulings on such demurrers by the circuit court appeals were taken to this court.

For the appellants there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *Ralph W. Jackman.*

For the respondent there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

ESCHWEILER, J. In the instant case the facts relied upon by plaintiff to sustain his right to vote and consequent right of action are as follows: His parents lived at Camp Douglas, Wisconsin, from which place he registered at the university and to which place he returns on his vacations. He came to the university after graduation from the preparatory school, for the purpose of taking a college course and preparing himself as a lawyer, and would not have come to Madison except for that. His expenses at college are paid partly by his father and partly by his own efforts. After graduating he does not know where he will go; that depends upon what opportunities offer. He has not in mind any business opening in Madison that he intends to accept after graduation. He never registered as a voter in any other place than Madison. He further said: "I consider this my home while in college, and have been advised and believe that under the above facts I did not come here for a temporary purpose merely, but this is my home within the meaning of the law of Wisconsin touching my right to vote within the city of Madison."

In these four kindred cases the only question raised and argued before this court is as to whether the respective plaintiffs, students at the Wisconsin University, are entitled to vote

in the city of Madison. No question is made but that if the facts presented show the plaintiffs are lawfully entitled to vote the defendants may be held liable as inspectors of election for such refusal. *Gillespie v. Palmer,* 20 Wis. 544, 558.

By sec. 6.51, Stats. 1915, the legislature has prescribed rules for determining the qualifications of electors and the following subdivisions of that section are material:

"Second. That place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning.

"Third. A person shall not be considered or held to have lost his residence who shall leave his home and go into another state or county, town or ward of this state for temporary purposes merely, with an intention of returning.

"Fourth. A person shall not be considered to have gained a residence in any town, ward or village of this state into which he shall have come for temporary purposes merely.

"Fifth. If a person remove to another state with an intention to make it his permanent residence, he shall be considered and held to have lost his residence in this state.

"Sixth. If a person remove to another state with the intention of remaining there for an indefinite time and as a place of present residence, he shall be considered and held to have lost his residence in this state, notwithstanding he may entertain an intention to return at some future period.

"Ninth. The mere intention to acquire a new residence, without removal, shall avail nothing; neither shall removal without intention."

In determining upon the facts as they appear in the respective complaints as to whether each of these students comes within the requirements of the above statute, certain principles have been declared which are helpful in solving the question.

Although intention is an important element of the status of an elector, yet his own statement as to any such mental resolution cannot of itself control that element in a situation like

this. *Carter v. Sommermeyer,* 27 Wis. 665; *Hall v. Hall,* 25 Wis. 600, 609.

The general rule is that a man must have a habitation or domicile somewhere and that he can have but one at the same time for one and the same purpose, and that in order to lose one he must acquire another. *Miller v. Sovereign Camp W. O. W.* 140 Wis. 505, 509, 122 N. W. 1126; *Opinion of the Justices,* 5 Met. 587, 589.

Every person can fix his own residence provided he makes it reasonably permanent by intending to return thereto when a temporary job is finished. *State ex rel. Small v. Bosacki,* 154 Wis. 475, 478, 143 N. W. 175; *State ex rel. Hallam v. Lally,* 134 Wis. 253, 257, 114 N. W. 447.

Attendance at an institution of learning for the sole purpose of acquiring an education is not of itself sufficient to establish the student as an elector. *Opinion of the Justices,* 5 Met. 587, 589; *Welsh v. Shumway,* 232 Ill. 54, 88, 83 N. E. 549; *Shaeffer v. Gilbert,* 73 Md. 66, 20 Atl. 434, 435.

That mere attendance as a student cannot of itself be sufficient to establish such a status has been expressly provided for in a number of state constitutions. For instance, § 3, art. II, Const. of New York, provides: "For the purpose of voting, no person shall be deemed to have gained or lost a residence . . . while a student of any seminary of learning." Under this constitutional provision it has been held that even four years of study and express renouncing of all other homes are not sufficient of themselves to give the status of qualified elector. *Matter of Barry,* 164 N. Y. 18, 58 N. E. 12; *Matter of Goodman,* 146 N. Y. 284, 40 N. E. 769. A similar provision is found in Colorado with the same construction (*Parsons v. People,* 30 Colo. 388, 70 Pac. 689), and in Missouri (*Hall v. Schoenecke,* 128 Mo. 661, 31 S. W. 97); also in Pennsylvania (*Lower Oxford Contested Election,* 11 Phila. 641).

This constitutional provision, however, does not seem to add anything to or change the general rule of law. *Shaeffer v. Gilbert,* 73 Md. 66, 20 Atl. 434, 435; *Pedigo v. Grimes,* 113 Ind. 148, 13 N. E. 700; *Dale v. Irwin,* 78 Ill. 170.

Much weight is to be laid upon the fact as to whether or not such student is what is commonly called "emancipated" from his family so far as looking to them for a home or a place to which to return or for means of support. *Opinion of the Justices,* 5 Met. 589; *Putnam v. Johnson,* 10 Mass. 488; *Dale v. Irwin,* 78 Ill. 170; *People v. Osborn,* 170 Mich. 143, 135 N. W. 921; *Berry v. Wilcox,* 44 Neb. 82, 89, 62 N. W. 249; *Shaeffer v. Gilbert,* 73 Md. 66, 20 Atl. 434; *Fry's Election Case,* 71 Pa. St. 302, 311.

Applying, therefore, the standard of the statutory requirements with the aid of the light from the foregoing decisions, we find in the case at bar a student who registers from Camp Douglas, where his parents reside and to which place he returns as opportunity, his vacations, permit, and who is dependent, in part at least, upon that home for his support. His attending the university, therefore, is clearly for a "temporary purpose merely," under the fourth subdivision of sec. 6.51. All the facts are much more consistent with Camp Douglas being his home within the meaning of subdivisions second and third of the statute than with Madison being such home. His abiding in Madison, therefore, avails him nothing, for it is the removal specified in the final clause of subdivision ninth quoted above.

In this case we are of the opinion that the defendants were clearly right under the facts as presented to them in denying plaintiff the right to vote, and the order of the circuit court overruling the demurrer to the complaint must be reversed.

By the Court.—Order of the circuit court reversed, and cause remanded for further proceedings according to law.

Siebecker, J., took no part.

The following opinion was filed October 10, 1916:

WINSLOW, C. J. (*concurring*). The general rules concerning the acquirement of a voting residence are prescribed by the statute, and these rules necessarily govern the present cases. Little, if any, aid is to be obtained from the decisions of other courts construing other statutes. The statutory provisions are quoted at length in the opinion of the court and need not be repeated.

Reduced to a single proposition they seem to mean this in substance: To acquire a voting residence in an election district one must have made it his fixed habitation (1) for no merely temporary purpose, (2) without present intention of removal elsewhere or return to his former abode for residence purposes, and (3) with intention of returning to such habitation whenever absent therefrom. The purpose is not necessarily temporary because it is expected to end at some time more or less remote in the future. Practically all human purposes have this quality. So the fact that the purpose is to go to school does not necessarily solve the question, although it seems clear that the intent to make change of residence would be less probable in such case and that the evidence of other facts and circumstances must be stronger in order to overcome the apparent temporary nature of the residence than in the ordinary case of removal on account of change of business. The solution must be found by inquiring whether the other statutory requirements are satisfied; and of these requirements the second above named is the most important and seems practically to be controlling, namely, the requirement that there be no present intention (*i. e.* intention existing at the time of the election) of removal elsewhere or return to the former abode for residence purposes. The direct statement of the voter as to his intention is not at all controlling upon this question. It may be overcome by persuasive facts showing the contrary.

On this subject two general propositions may be laid down, viz.: If the student has a family of his own and removes the same to the college town and supports them there, or if, being separated from his father's family and earning his own way wholly or substantially, he removes to the college town, these are persuasive circumstances more or less conclusive tending to show an acquirement of a voting residence there. If, on the other hand, he have a father or mother living, who maintains a family residence in another town, to which residence the student returns in vacation time, and if such parent supports the student wholly or substantially, these are quite persuasive circumstances tending to show that there has been no change of voting residence, especially if the student registers or describes himself as of such family residence.

Other circumstances, such as the age of the student, the fact, if it is a fact, that he has already been out in the world earning his own living, or that he has already had a voting residence at some place other than the parental home, will be entitled to weight in determining the question. No rule can be laid down which will at once determine every case. Each case must depend upon its own facts.

It will be seen, as said in the beginning of this opinion, that the legislature has laid down the general rules governing these cases. The court can do nothing but apply them. If there be need of change in them the appeal must be to the legislative branch of the government.

Marshall, J. I concur in the opinion by the Chief Justice.

ASBAHR, Respondent, vs. WAHL and another, Appellants.

September 15—October 3, 1916.

Elections: Right of students to vote: Residence.

1. While attendance at an educational institution for the sole purpose of getting an education is for a "temporary purpose," within the meaning of sub. 4, sec. 6.51, Stats. 1915, other elements may be added which develop such purpose into one of making a home at that place.
2. Thus, an entirely self-supporting student who came to Madison from a distant state, where his parents reside, but who had been emancipated from them and had earned his own living and voted elsewhere than at their home, might, even though he came for the sole purpose of attending the state university, have the intention to acquire a new residence in Madison, within the meaning of sub. 9, sec. 6.51, Stats. 1915; and in such case, having registered from Madison and fixed his habitation there, with no present intention of removing therefrom and an intention, whenever he is absent, of returning thereto, he is entitled to vote in Madison.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the complaint.

For the appellants there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *Ralph W. Jackman.*

For the respondent there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

ESCHWEILER, J. The facts in this case, other than those, common to all, set out in the *Seibold Case* (*ante,* p. 82, 159 N. W. 546), in some respects are substantially different from those in that case in the following particulars:

Plaintiff came to the university in Madison in the fall of 1914 to take a course in the law school and for no other purpose. He came from Pendleton, Oregon, where he had been

teaching school. His parents reside at Cornelius, Oregon. He registered at the University of Wisconsin as from Madison and he intends to stay there during his course at least. The preceding summer vacation he was away from Madison and was not certain where he would spend the following vacation. He does not know where he will go when he graduates; that will depend upon what opportunities offer, which might include his remaining in Madison. He is entirely self-supporting and receives no aid or help from his parents.

He also makes the same statement as to his belief that Madison is his home as in the other cases.

We have the situation here of a student in one of the departments of the university whose work is, in the natural order of things, at the end of a college course; entirely emancipated from his family for a long period of time; earning his own living and exercising the right of voting elsewhere than at the home of his parents and thereby necessarily claiming a home other than with such parents; no returning to the home of his parents after temporary absences therefrom, and further, with no present intention of returning to his former residence at Pendleton, Oregon.

This is sufficient to meet the standard required of a legal voter by sec. 6.51, Stats. 1915, at the voting booth in Madison where he presented himself.

There is here an intention to acquire a new residence at Madison coupled with the removal from Pendleton, Oregon, to Madison under the ninth subdivision of that section of the statute in question. Madison appears to be his habitation without any present intention of removal therefrom, and to which place, whenever he is absent, he has the intention of returning, thus meeting the provisions under sub. 2.

The purpose of getting an education, which of itself, and alone, would be a "temporary purpose" under the fourth subdivision, has now added to it elements which develop that

purpose into the one of making Madison his home, as he has the right to do. He therefore meets the statutory tests and he was entitled to vote.

The order of the circuit court overruling the demurrer to the complaint is therefore affirmed.

By the Court.—Order affirmed.

SIEBECKER, J., took no part.

GROSS, Respondent, vs. WAHL and another, Appellants.

September 15—October 3, 1916.

Elections: Right of students to vote: Residence.

1. A student who came to Madison to attend the law school of the state university, registering from another place in the state, where his parents reside and where he spent his last vacation, but who had taught school for several years in another city in the state and had voted there, and whose expenses are paid partly from his own money and partly from money borrowed from his father which he is under obligation to repay, is *held* entitled to vote in Madison.
2. Giving his complaint a liberal construction, the attendance of such student at a law school in Chicago for a part of a year did not break the continuity of his residence in this state.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a demurrer to the complaint.

For the appellants there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *Ralph W. Jackman.*

For the respondent there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

Eschweiler, J. In this case, in addition to the general statements found in the kindred case of Seibold against these same defendants and decided herewith (*ante,* p. 82, 159 N. W. 546), it further appears that the plaintiff registered at the state university from La Farge, Wisconsin, where his parents reside and where he spent his summer vacation. He taught school in Fort Atkinson from 1912 until the end of the school year 1915, and voted in Fort Atkinson during that time and at Beloit while a student there. He entered the law school of the University of Chicago in the fall of 1915 and in February, 1916, came to Madison to attend the law school. He intends to stay here during his college course at least. He does not know where he is going when he graduates; it will depend upon what opportunities offer, which may include his remaining in Madison. His expenses are paid partly from his own money and partly from money which he borrows from his father and which he will be obliged to return. He also makes a statement as to his belief as to his residence similar to that quoted in the *Seibold Case.*

Although not so strong a case upon the facts as the one of Albert Asbahr against the same defendants (*ante,* p. 89, 159 N. W. 549), yet we are satisfied that upon the facts of the complaint there is a showing of a substantial compliance with the statutory requirements. He has made a home for himself elsewhere than with his parents, he has to a large extent supported himself, and what he receives from his father now he is under obligation to repay, just as though it were advances from some stranger. He has exercised the right to vote at places other than the home of his parents.

We cannot say, giving the liberal construction that we must to his complaint, that his attendance at the Chicago law school in the fall of 1915 until February, 1916, was sufficient to break the continuity of his residence in this state. The plaintiff, on the showing made, was lawfully entitled to vote,

and the court below was right in overruling the demurrer to the complaint, and the order so doing is therefore affirmed.

By the Court.—The order of the circuit court is hereby affirmed.

SIEBECKER, J., took no part.

WADSWORTH, Appellant, vs. WAHL and another, Respondents.

September 15—October 3, 1916.

Elections: Right of students to vote: Residence.

A student who came to Madison solely to attend the state university, registering from a foreign state, where his parents reside and where he spends a part of his vacations, and whose expenses are partially paid by his father, is not a resident of Madison, within the meaning of sec. 6.51, Stats. 1915, and hence not entitled to vote there.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint.

For the appellant there was a brief by *Sanborn & Blake,* and oral argument by *John B. Sanborn.*

For the respondents there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *Ralph W. Jackman.*

ESCHWEILER, J. In addition to the general facts recited in the *Seibold Case* (*ante,* p. 82, 159 N. W. 546), it appears that this plaintiff registered from Fort Thomas, Kentucky, where his parents reside, at which place he spent part of his preceding Christmas vacation. The preceding summer vacation he spent at Madison and expected to be there the fol-

lowing vacation, but did not stay there during his first year's vacation. He came to Madison to attend the university and would not have come save for that. Save the $250 he earns as editor of the Badger, the rest and bulk of his expenses are paid by his father. His residence after graduation will depend upon what opportunity offers itself. He has in mind no business opening in Madison that he intends to then accept. He makes the same statement as to his belief that Madison is his home as is quoted at length in the *Seibold Case.*

In considering the facts in this case in the light of what has been said in the kindred cases decided herewith, we are constrained to hold that the plaintiff does not disclose under his statements sufficient to warrant a finding that his present residence, within sec. 6.51, Stats. 1915, is in the city of Madison, and we therefore hold that the defendants were justified in refusing him the right to vote.

The order of the court below sustaining the demurrer to his complaint is affirmed.

By the Court.—Order affirmed.

Siebecker, J., took no part.

Jackson, Appellant, vs. Industrial Commission of Wisconsin and another, Respondents.

Same, Respondent, vs. Same, Appellants.

September 16—October 3, 1916.

Workmen's compensation: Partial dependency of sister on deceased employee.

Evidence showing, among other things, that an employee who sustained fatal injuries was on friendly terms with his sister and had, during the period of five months prior to his death, partly paid for care, board, and lodging furnished to her by an uncle,

and tending to show that she will probably be able to provide partially for her own needs and that if he had lived he would have continued to contribute to her support, is *held* to sustain a judgment of the circuit court reversing an order of the industrial commission on the ground that she was not wholly, but was partially, dependent on the deceased.

APPEALS from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action to set aside an award of the *Industrial Commission* requiring the plaintiff and the Employers Mutual Liability Insurance Company to pay to applicant the sum of $1,931.70 on account of the death of her brother, Oscar Rintala, caused by an accidental injury while in the employ of the plaintiff. The circuit court set aside the award of the *Industrial Commission* and remanded the cause to the *Commission* for further proceedings. Both parties appeal from this judgment of the circuit court.

Some five years ago, Oscar Rintala, the deceased, and his sister, the applicant, immigrated to this country from Finland. They first went to Cloquet, Minnesota, where they lived with an uncle, and in about two years they took up their residence with another uncle in Ironwood, Michigan. At the age of seventeen the applicant commenced working for others by doing housework. She worked for various people, earning from $10 to $15 per month, besides having board and room provided her. While she was engaged in this kind of work she became pregnant and a child was born. She was not married at this time. When the applicant found that she was pregnant she appealed to her deceased brother for aid, who was then working for the plaintiff in the woods. He took her to his uncle's home in Minnesota and agreed with the uncle to pay her expenses and $10 a month for her board. This was about the 1st of October, 1914. The child was born on the following December 28th and the applicant continued to live with the uncle up to the time of Oscar's death on March 6, 1915. From October 1, 1914, until March 6, 1915,

she was unable to do any work or in any way earn anything for her support. The deceased gave her money and sent money to the uncle to pay the doctor's bill, her board, and other expenses. The uncle in Minnesota received $45 from deceased to pay for her board.

On March 6, 1915, Oscar Rintala, while in the employment of the plaintiff and performing service growing out of and incidental to his employment, accidentally received personal injuries which resulted in his death.

The *Industrial Commission* found as facts that the injuries were proximately caused by accident while deceased was performing services growing out of and incidental to his employment, and that the applicant was a sister of the deceased and at the time of death was wholly dependent upon the deceased for support.

The circuit court set aside the *Commission* award on the ground that the sister was not wholly dependent upon the deceased for support, but was only partially dependent on him, and remanded the cause to the *Commission* to determine the extent of the partial dependency. From such judgment both parties appeal.

For the plaintiff there were briefs by *Brown, Pradt & Genrich,* and oral argument by *L. A. Pradt.*

For the defendant *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

Siebecker, J. The question in this case presents the inquiry, Did the *Commission* err in holding that decedent's sister is entitled, under the provisions of the Compensation Act, to receive the benefit provided for persons wholly dependent upon employees who die from injuries received in the course of their employment? These statutes provide that the facts of dependency and of the extent thereof are to be determined in accordance with the facts as they exist at the time of the accident to the employee. An investigation of the facts and circumstances as disclosed by the record establishes that the

decedent and his sister, the applicant, were on friendly relations and that he was disposed to aid her to secure the necessities of life in case she needed such assistance; that he furnished pecuniary aid for her support during the period of five months immediately prior to his death, and that he would have continued to give her such aid thereafter if her necessities demanded such assistance. It also appears, as the circuit court held, that her uncle took her into his family and furnished the privileges of a home during the last three months of her pregnancy, during the lying-in period and the succeeding two months, up to the time of her brother's death. True, this uncle received some compensation from the decedent for this care and support of her, but it is clear that the amount so received only partly paid for the care, board, and lodging furnished by the uncle. The evidence does not clearly indicate what the uncle's treatment of her would have been if the brother had refused to contribute to her support. But it is apparent that the applicant in all probability will hereafter require assistance to secure the necessities and comforts of life, when we consider her circumstances in life, her want of financial means, and her ability to earn a livelihood in view of her misfortunes that attend her motherhood. The evidence justified the inference that she will probably be able to partially provide for her needs and that if the decedent had lived he would have continued to contribute to her support. We deem the facts and circumstances of the case establish the fact that the applicant was partially dependent on decedent for support at the time of the accident within the contemplation of the Compensation Act.

Upon this state of the case the circuit court properly reversed the order of the *Industrial Commission* and rightfully recommitted the controversy to the *Commission* to determine the extent of the partial dependency of the applicant.

By the Court.—The judgment is affirmed on both appeals. No costs to be taxed in the action.

BLASER, Respondent, vs. VANDEN HEUVEL, imp., Appellant.

September 12—October 24, 1916.

Officers: Malfeasance: Town chairman: Discounting claims: Bounties on gophers, etc.: Payment by county: Recovery: Taxpayers' action: Claims: Filing: Verification: Allowance by county board.

1. Where, at the request of the other members of the town board, a town chairman advanced money to pay bounties on gophers, hawks, and crows, and cashed certificates issued for such bounties, but discounted them sufficiently to reimburse himself for the interest on money which he borrowed for that purpose, such contracts of discount between the chairman and the owners of the certificates were not rendered void by secs. 4549, 4550, Stats.
2. The certificates so cashed having been filed with the town clerk, a claim for the amount thereof having been made by the town to the county board and allowed by it, and the money therefor having been paid to the town and by the town to the chairman, and it appearing that the claim was for the correct amount and that the sum paid by the county to the town was the amount lawfully due to the persons entitled to the bounties, a taxpayer of the county could not maintain an action to compel the town chairman to restore such sum to the county.
3. The fact that the bounty certificates were not filed within twenty days from the date thereof (sec. 1630*b*, Stats. 1913; sec. 62.49, Stats. 1915) did not preclude their being afterwards filed and considered.
4. Where a claim filed with the county board without verification was disallowed for that reason, such disallowance did not bar a subsequent presentation of the same claim, duly verified, and its allowance by the board.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Reversed.*

This action was brought by the plaintiff, a taxpayer of Oconto county, Wisconsin, to recover from the appellant, as chairman of the town of Chase in said county, money which appellant advanced to pay gopher and other bounties in 1910 and which had been repaid him by Oconto county. Prior to 1910 the county board of Oconto county passed a resolution providing for the payment of bounties on gophers, hawks, and

crows, such bounties being fixed by the statute. The appellant, chairman of the town of Chase, was requested by the other members of the town board to advance the money with which to pay the bounties, as the town had no money at the time. On proper affidavit the appellant issued certificates for the amount of the bounties and cashed some of them, deducting therefrom an amount sufficient to reimburse him for interest which he was paying on money borrowed to pay the bounties. The amount of discount charged on the certificates was between $40 and $45. Appellant afterwards filed with the town clerk the certificates which he cashed. When all certificates had been paid, either by cash advanced by appellant or by town orders issued to the bounty claimants, a claim was made by the town to the county board, which claim was allowed and paid into the town treasury of the town of Chase. The town then paid to the appellant the amount of money represented by the certificates which he had cashed, which is the amount for which judgment was rendered in this action with interest.

It is established that the county of Oconto paid no more for such bounties than it would have paid had the certificates all been filed with the town clerk of Chase and orders issued in exchange for them. It further appears from the record that there was $654.90 paid to the appellant to reimburse him for moneys paid for gopher bounties.

The court below held upon the established facts that the county board had no authority to allow the claim of the town of Chase for moneys paid by appellant and that such payment was illegal, and that the appellant was a trustee of Oconto county for the sum of $654.90, and that the appellant pay over to Oconto county said sum with six per cent. interest from May 10, 1911, with costs.

Judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Classon & O'Kelliher*, and oral argument by *V. J. O'Kelliher*.

For the respondent there was a brief by *Lehner & Lehner,* and oral argument by *Philip Lehner.*

Kerwin, J. The contention of counsel for respondent in support of the judgment below is based on secs. 4549 and 4550, Stats. Sec. 4549 makes it an offense for certain officers, including members of town or village boards, among other things, to reserve or acquire any pecuniary interest in any purchase or sale of property or thing in action or in any contract, and provides a punishment by imprisonment in the county jail not more than one year or in the state prison not more than five years, or by fine not exceeding $500; and sec. 4550 makes it an offense for any person mentioned in sec. 4549 to redeem, discount, or purchase any debt or demand in favor of any other person against any town, city, or village, or against any fund thereof below the true and full amount thereof, and provides a punishment therefor by imprisonment in the county jail not more than one year or by fine not exceeding $500.

It is the contention of the respondent and was so held by the court below, as we understand the record, that the transaction between the certificate owners and the appellant by which the appellant discounted the certificates was in violation of the statute and rendered the transaction void, hence appellant could not avail himself of the benefits of the contract of discount. It appears from the record that the amount reported by the town to the county for bounties was the correct amount due, and that the amount paid by the county to the town was the amount lawfully due to the persons entitled to the bounty, and that the county paid no more than the amount due and certified to be due by the town.

It is also clear that the plaintiff's claim upon the merits is based upon the theory that the statutes above referred to rendered the transaction of discount between the appellant and the owners of the certificates void. The statutes in question

do not declare such a contract void, but provide a punishment for doing of the act. True, where the statute does not expressly declare the contract void, but prohibits, by penalty, the making thereof, courts in some cases have construed the statute as expressing a legislative purpose that such contracts shall be void and others that they shall not be. The subject is fully treated in *Laun v. Pacific Mut. L. Ins. Co.* 131 Wis. 555, 111 N. W. 660. It is considered that, applying the logic of that case to the statute in question, it should not be construed as rendering such contracts as we have here void.

Counsel for respondent also make the point that the certificates were not filed within twenty days as required by statute. They were, however, afterwards filed and considered, and we think properly. It is also claimed by respondent that the claim was barred because first filed with the county board without verification and disallowed and afterwards a proper claim was filed, duly verified, considered, and allowed. Obviously from the record the first claim was not considered because not verified, or disallowed for that reason, hence there was no bar. *Meyer v. Outagamie Co.* 134 Wis. 86, 114 N. W. 94. We are satisfied upon the undisputed facts in this case that no case was made by the plaintiff under the statutes referred to or otherwise. *Laun v. Pacific Mut. L. Ins. Co.* 131 Wis. 555, 111 N. W. 660; *Trojanowski v. C. & N. W. R. Co.* 163 Wis. 76, 157 N. W. 536.

By the Court.—The judgment below is reversed, and the cause remanded with instructions to dismiss the complaint.

Schildt, Appellant, vs. Johnson, Receiver, Respondent.

September 13—October 24, 1916.

Street and interurban railways: Injury to person waiting to board car: Contributory negligence.

Plaintiff, an able-bodied man forty-five years of age, with good eyesight and in possession of all his faculties, attempted, in a customary way, to signal an interurban car at night, at a highway crossing, by lighting matches and holding them near the track. As the car drew near, he stepped back to what he thought was a safe distance. The car did not stop, and as it was passing he was either struck by, drawn under, or stumbled against the car and was injured. He had watched the approach of the car through a distance of two blocks or more and knew that it had an overhang of about three feet. Assuming, but not deciding, that he was a passenger, it is *held* as a matter of law that he was guilty of contributory negligence in standing so close to the car. Eschweiler, J., dissents.

Appeal from a judgment of the circuit court for Kenosha county: E. B. Belden, Circuit Judge. *Affirmed.*

The plaintiff came in the evening of November 7, 1915, to a highway crossing on defendant's interurban line, prepared to pay his fare and to board one of its cars going to Kenosha.

It was customary for certain of its cars known as local to stop on signal at this crossing for passengers; the limited cars or trains, however, went by without stopping, but in the nighttime as they approached there was no way of distinguishing them from the local cars.

A three-inch plank about ten inches wide had been placed at the end of the ties at this crossing and some gravel had been spread by the company just outside of this track and plank for the convenience of passengers. From a point which has been located indefinitely as about eight to fifteen feet outside of the rail on the side where plaintiff waited, the ground sloped down quite a little from the track. A line of trolley poles about eight feet from the track extended in a

straight line along the track on which the car in question was approaching.

The evidence disclosed that there was no method of signaling approaching cars provided by the company and that it was customary for waiting passengers, among other ways, to light matches and hold them near the track so that the flash would give notice to the approaching motorman.

As plaintiff, with a Mrs. Pagel who also intended to take the same car, saw the approaching headlight, he lit matches two or three times and held them near the track, and on its approach stepped back to what he says he thought was a safe distance. The car did not stop, and as it was passing he was either struck by, drawn under, or stumbled into the car and was severely injured on his right arm and other parts of the body. The injury on the arm apparently indicated that the force causing it was applied at the hand, pressing it back and causing fractures of the elbow joint. The exact manner in which the injury occurred is indefinitely described by the plaintiff and the one witness to the same, but it appeared that at the moment of impact the plaintiff seemed to twist around and fell into the ditch alongside the track.

At the close of plaintiff's testimony the court below granted defendant's motion for a nonsuit, and entered judgment dismissing the action. The plaintiff appealed.

For the appellant there was a brief by *Calvin Stewart,* attorney, and *George W. Taylor,* of counsel, and oral argument by *Mr. Stewart.*

For the respondent there was a brief by *Fisher & Fisher,* attorneys, and *G. F. Hellmuth,* of counsel, and oral argument by *Peter Fisher, Sr.*

VINJE, J. The trial court held that the relation of passenger and carrier had not arisen; that the defendant was not negligent; and that plaintiff was guilty of contributory negligence as a matter of law. We need not determine whether under the facts of the case the relation of passenger and car-

rier existed at the time of plaintiff's injury, or whether defendant was negligent, because, conceding for the purposes of the case that plaintiff was a passenger, we still think he was guilty of contributory negligence in standing so close to the car when it passed as to be struck by it or to lose his footing by reason of the force or suction of the air current created by its passage. There is nothing hidden or deceptive in the swift motion of a car. A child of even quite tender years senses the danger of standing close to such a rapidly moving object. The car was an ordinary interurban one with the usual overhang. Its headlight enabled plaintiff to see it coming and there was no reason why he could not have stepped back far enough to be safe. His failure to do so when he stood and watched its approach must be held to be contributory negligence. Obviously cases cited to the effect that it is negligence to cross a railroad track without looking and listening have no application to this case, for plaintiff testifies he stood and watched the approach of the car for at least two blocks. He was an able-bodied man forty-five years of age, with good eyesight and in possession of all his faculties so far as it appears. Under such circumstances, knowing, as he says, that the car had an overhang of perhaps three feet, it was his duty to avoid the zone of danger.

It was not a case of the best means of escaping from a sudden perilous position, as plaintiff's counsel argues. The position was voluntarily assumed; the impending danger observable, and the only means of escape was to step back out of danger. Plaintiff says the speed of the car was so great that it "drawed him in." If so, he must have sensed the great rate of speed some appreciable time before the car reached him, because he stood all the time looking directly at it. Under such circumstances both his sense of sight and hearing would disclose the high rate of speed in time to enable him to step back to safety before the car reached him.

By the Court.—Judgment affirmed.

ESCHWEILER, J. Under the facts in this case I think plaintiff was clearly a passenger (*Tarczek v. C. & N. W. R. Co.* 162 Wis. 438, 441, 156 N. W. 473), and that it was properly a jury question to determine whether or not defendant was negligent in furnishing the place for such passenger to approach and board its cars. The evidence showed that he did appreciate the situation and did use some care to avoid danger, and the jury, not the court, should have said whether, in the light of all the surrounding circumstances, this was ordinary care. *Spencer v. M. & P. du C. R. Co.* 17 Wis. 487, 493; *Munroe v. Pa. R. Co.* 85 N. J. Law, 688, 90 Atl. 254, Ann. Cas. 1916A, 140; *Richardson v. D. & M. R. Co.* 176 Mich. 413, 423, 142 N. W. 832. I therefore dissent.

CHIPPEWA & FLAMBEAU IMPROVEMENT COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

September 15—October 24, 1916.

Waters: Reservoir dams: Statutes: Purpose: Repeal and amendment: General and special laws: Regulation of flow and levels at dams in navigable waters: Powers of railroad commission: Flowage rights: Extent: Prescription.

1. Although the primary purpose of ch. 640, Laws 1911,—authorizing the plaintiff company to construct, acquire, maintain, and operate a system of reservoirs on the headwaters of the Chippewa and Flambeau rivers,—was the storage of large quantities of water for creation and utilization of power, yet *it seems* that the legislature had also in mind the general welfare on all said waters, including the small lakes which are at the headwaters of the rivers named and are really mere enlargements of the rivers themselves.
2. Although repeals by implication are not favored, and acts directed to a special subject are generally to be given effect rather than a general act, yet where the legislative intent to make the general act controlling is apparent, it will be given that effect.

3. Ch. 380, Laws 1915 (sec. 1596—2, Stats.),—empowering the railroad commission, "in the interest of public rights in navigable waters or to promote safety and protect life, health and property," to regulate and control the level and flow of water in all navigable waters and to designate "the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters," etc.,—announces a general policy as to all the navigable waters of the state which is applicable to the reservoir dams operated by the plaintiff under the authority of ch. 640, Laws 1911.
4. Ch. 640, Laws 1911 (in which the right to repeal or amend at any time was specifically reserved), was amended by said ch. 380, Laws 1915; and under the latter act the railroad commission was authorized to take into consideration, in fixing levels, the property rights and interests of riparian owners on the lakes at the headwaters of the rivers named in the act of 1911.
5. Having enacted such general law (ch. 380, Laws 1915) in effect declaring that water may not be maintained in any dam in navigable waters at a level which is injurious to the public rights in such waters, or which threatens safety, or imperils life, health, and property, the legislature might properly endow the railroad commission with power to investigate and ascertain the facts and to make such regulations and orders as may be necessary to carry into effect the law in concrete cases; and in so doing it did not delegate legislative power to the commission or confer judicial power upon it.
6. Under sub. 2, sec. 1, ch. 640, Laws 1911,—which preserves to the plaintiff company, on its purchase of an existing dam, all franchises and flowage rights, either perfected or inchoate, possessed by the former owner at the time of the sale,—the burden of proof is on the plaintiff to show that it possesses such rights with respect to a dam at which water levels are fixed by the railroad commission under ch. 380, Laws 1915.
7. Possession of flowage rights on a part of the shore of a reservoir gives no right to flood that part of the shore owned by others.
8. Prescriptive rights in an easement are commensurate only with the actual enjoyment of the easement.
9. Thus, if the water of a dam is kept up only during certain months of the year for the period necessary to create a prescriptive right, the owner of the flowed land being in possession at all other times, no right will be thereby acquired to keep the water up during the remaining months.
10. Maintenance of a log-driving dam by which a head of water is raised in the early spring but immediately reduced by the use of the water in successive rapid miniature floods during the

spring months, so that ordinarily the dam is empty at the beginning of the summer and so remains, gives no prescriptive right of flowage by means of a reservoir dam devoted to the storing of large quantities of water in the spring or wet seasons, to be gradually depleted in times of drouth for the purpose of producing as nearly as possible a uniform flow of water at all seasons in the river below the dam; and a prescriptive right to flow lands by a log-driving dam was not available to the plaintiff company which had bound itself, by acceptance of its charter, to use the dam as a reservoir dam.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The plaintiff is a corporation authorized by ch. 640, Laws 1911, to maintain a system of water reservoirs on the headwaters of the Chippewa and Flambeau rivers. It acquired and owned a dam in the Manitowish river at the outlet of Rest lake, which had been built in 1888. September 10, 1915, the defendant *Commission* made an order requiring that said dam should be maintained and operated so that at no season should the maximum head of water therein exceed eight feet six inches, nor be less than five feet six inches, except when the reservoir was covered with ice, when it might be lowered to a head of two feet six inches.

This action is an equitable action brought to set aside that order for various reasons hereinafter stated.

The circuit court found the order to be both reasonable and lawful, and from that judgment the plaintiff appeals.

Ch. 640, Laws 1911, is an act designed to provide for the creation of a system of water reservoirs on the rivers named, primarily for the purpose of storing water in seasons of high water and letting it out gradually in seasons of low water, thus producing an uniform flow for the benefit of water powers below. The title and first two sections of the act read as follows:

AN ACT to authorize the *Chippewa and Flambeau Improvement Company* to construct, acquire, maintain, and operate a system of water reservoirs located on the headwaters of the Chippewa and Flambeau rivers

and their tributaries, as described herein, for the purpose of producing a uniform flow of water in the Chippewa and Flambeau rivers and their said tributaries, and thereby improving the navigation and other uses of said streams and diminishing the injury to property both public and private.

"*The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:*

"Section 1. 1. Subject to the supervision and control hereinafter provided for, authority is hereby given unto the *Chippewa and Flambeau Improvement Company,* in order to promote the purposes hereinafter set forth, to create, construct, acquire, maintain, and operate a system of water reservoirs located in or along the Court Oreilles river and its direct or indirect tributaries above the north line of town 38 north, the east and west forks of the Chippewa river and their direct or indirect tributaries above the junction of the same, the Thornapple river and its direct or indirect tributaries above its mouth, Butternut creek and its direct or indirect tributaries above its mouth, the north fork of the Flambeau river and its direct or indirect tributaries above the flowage of the dam authorized to be built by chapter 400 of the Laws of 1905, as amended by chapter 361 of the Laws of 1907, and the south fork of the Flambeau river and its direct or indirect tributaries, including the Elk river, above the junction of said south fork of the Flambeau river and said Elk river, in this state, and for that purpose said grantee may construct, acquire, maintain, and operate all such dams, booms, sluiceways, locks, and other structures in, along, or across any and all of said portions of said rivers and their said tributaries as may be necessary or reasonably convenient to accomplish the purposes of this grant, and may clean out, straighten, deepen, or otherwise improve any of said rivers and tributaries in order to improve the navigation thereof and to prevent injury to property bordering on said waters.

"2. All franchises and all riparian rights and rights of flowage, either perfected or inchoate, howsoever acquired, by any person or any corporation organized to improve the navigation for any purpose of either or any of said rivers or their tributaries, shall be and hereby are made assignable to the *Chippewa and Flambeau Improvement Company,* and shall be

of the same force and effect in the possession and ownership of such assignee to accomplish the purposes of this act *as* the same may have *had* before assignment to accomplish their original purpose.

"Section 2. 1. The said authority is granted for the purpose of producing as nearly a uniform flow of water as practicable in the Chippewa and Flambeau rivers, through all seasons, by holding back and storing up in said reservoirs the surplus water in times of great supply, and discharging the same in times of drought and a scarcity of water, and thereby, and by other means, improving the navigation of said Chippewa and Flambeau rivers throughout their entire length, for boats, barges, and other water-craft, and for the running, driving, rafting, booming, storing, sorting, and delivering of logs, timber, and lumber, and other forest products, and for the purpose of improving the usefulness of said streams for all public purposes, and of diminishing the damage and injury by floods and freshets to property, both public and private, located along said waters.

"2. It shall be the duty of said *Chippewa and Flambeau Improvement Company* to so manage, operate, and maintain all of its said reservoirs and other works that the purposes aforesaid shall be accomplished to the greatest practical extent and so that as nearly a uniform flow of water as practicable shall be maintained at all times and at all points on said Chippewa and Flambeau rivers; and during the times when it may be found impracticable to maintain at the same time such uniform flow of water throughout the entire length of said rivers, the upper portions of said rivers shall be given preference."

Sec. 3 of the act clothes the company with the power of condemnation of lands and riparian rights requisite for the construction or maintenance of any reservoirs, dams, or improvements necessary to accomplish the purposes of the act. Sec. 4 provides that when the improvements owned or controlled by the company render log driving practicable on any stream, it may collect tolls on the logs driven and shall have the rights and remedies granted to river improvement companies under sec. 1777, Stats. Said section further gives

the corporation the right (after it has established water reservoirs which will store 1,500,000,000 cubic feet of water which would not be stored by nature) to charge and collect reasonable tolls from water-power owners on said rivers, or their tributaries, who are benefited thereby, not exceeding a certain percentage on the investment, such tolls to be fixed by the *Railroad Commission.* Sec. 5 contains full provisions regulating the manner of determining the rates of toll by the *Commission* and providing for their becoming a lien upon water powers, dams, and flowage rights in case they are not paid. Sec. 6 prohibits the company from purchasing any dam or flowage rights until they have been appraised by the *Commission,* or for any price in excess of such appraisal. It also prohibits the erection of a new dam except upon plans approved by the *Commission,* and requires the company to institute condemnation proceedings to acquire title to any lands which the *Commission* concludes will be necessarily overflowed by any new dam. It also contains the following clause:

"Such railroad commission shall cause the height to which the water may be raised by any dam to be indicated by permanent monuments and bench marks, and shall have supervision and control of the time and extent of the drawing of water from the reservoirs, and the power to compel the maintenance of all reservoirs established."

Sec. 7 provides that all dams maintained by the company shall be subject to the statutes relating to sufficient fishways and shall also have all necessary slides and other necessities for the passage of logs. Sec. 8 declares the act to be a public act, for the accomplishment of public purposes, and that it is to be favorably construed to that end. Sec. 9 reserves the right to repeal or amend the act, provides that if the company shall not have in operation reservoirs with a capacity of 1,500,000,000 cubic feet by January 1, 1913, its rights under the act shall cease, and that the state, whenever it has the constitutional power, may take over all the company's works

for a compensation to be fixed in a certain specified manner. Sec. 10 provides that the act shall not be construed as divesting or releasing any right or interest held by the state or that may be acquired under any law of the United States.

While the proceedings before the *Railroad Commission,* which finally resulted in the making of the order in question, were pending, ch. 380, Laws 1915, was passed, and it was stipulated by all the parties to the proceeding that the *Commission* should proceed and determine the matter with the same force and effect as if the entire proceeding had been commenced and all action taken subsequent to the passage of said ch. 380. By that chapter sec. 1596—2 was added to the Wisconsin Statutes, the first two subdivisions of which are as follows:

"1. The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

"2. The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of sections 1596—1 to 1596—26, inclusive, of the statutes."

It appears by the testimony taken in the case that the Rest

lake dam was constructed in 1888 and was capable of retaining a sixteen-foot head of water. The water area affected by the dam is about eight square miles and includes a number of connected lakes. The dam was built by the Chippewa River Improvement and Log Driving Company under a legislative charter granted by ch. 449, Laws 1887, to Charles H. Henry, and by him assigned to said company. By this act Henry and his assigns were authorized to improve the Flambeau river "for log-driving purposes" by building and maintaining dams and other structures, including a dam at the place in question, the same to be operated for the use and benefit of all persons desiring to navigate the stream with sawlogs. They were also empowered to demand certain tolls for logs driven and were given the powers given to log-driving corporations by sec. 1777 of the Revised Statutes of 1878 and its amendments. The right to amend or repeal the act was expressly reserved.

The dam was used for log-driving purposes until the year 1904, although few logs were driven after the year 1897; then the driving of logs ceased entirely on the river and the dam necessarily ceased to be used for such purposes.

During the log-driving years a head of about sixteen feet of water was obtained about the middle of April, when the driving would begin, and the drives would be finished about July 1st, when the water would be drawn down to about the natural level, where it would remain for a period of one to four months. In 1901 the dam began to be used for reservoir purposes to some extent and was so used until it was sold to the plaintiff in 1912. During these three years the maximum limit of the level was thirteen feet and six inches, while for much of the time it was twelve and one-half feet, and during the last four or five years of that time ten or ten and one-half feet. From 1901 until 1912 water would be drawn down to its natural stage during four or five months of the year, beginning in July and ending in October or November.

During one year, near the end of that period, no use was made of the dam either for log driving or water power; the water was allowed to run off. The plaintiff owns flowage rights on some of the riparian lands flooded by the dam, but how much does not appear. There are many owners on the various lakes as to whom flowage rights have not been obtained unless by prescription. These property owners objected to the maintenance of the dam at the level proposed by the plaintiff, and during the year 1914 the plaintiff applied to the defendant *Commission* for authority to raise the water to a maximum level of ten feet with permission to draw the water down to the natural flow of the water, or zero on the gauge. A number of private property owners appeared upon the hearing of the petition and objected to the granting thereof. Considerable testimony was taken, and the *Commission* finally made the order which is attacked in this action, fixing a maximum level of eight feet six inches and a minimum level of five feet six inches, except when the lake is covered with ice, at which time reduction to a level of two feet six inches is allowed.

It is estimated by the plaintiff's expert witness that the Rest lake dam, at a ten-foot head, has a storage capacity of 1,500,000,000 cubic feet, which would be reduced to 465,000,000 cubic feet under the levels ordered by the *Commission.*

The *Commission* based their order mainly upon the injury caused to riparian property on Rest lake and the other lakes included in the reservoir area by the extreme variations in the level of the water if the plaintiff's request be granted.

In an opinion filed in the matter, the *Commission,* among other things, say:

"Rest lake is one of a large chain of lakes constituting what is known as the Manitowish waters. The dam will affect the level not only on Rest lake, but the lakes heretofore mentioned. The respondent has not shown any reservation

in any deeds under which riparians claim or others claim whose lands will be overflowed if the maximum level asked for by the petitioner is allowed by the *Commission*. The shore line probably exceeds fifty miles, and a ten-foot level will not only overflow a large acreage of land bordering on the lakes, but the level fixed will directly concern the owners of shore property throughout the lakes. The waters are among the most famous summer resort and fishing waters in the state of Wisconsin. Large sums of money have been invested by resort owners in resorts along the shores of the lakes and on the islands, and the waters are resorted to by thousands from this and adjoining states during the summer seasons. There are many private homes built along the shores of the lake and large sums of money have been put into these improvements. No effort was made to show the amount of investment by property owners along these lakes, and the *Commission* has no data from which it can estimate the amount of this investment, but it is large. For the last two or three years the petitioner has varied the level throughout practically all stages which it now requests may be established.

"The effects of this great variation in water level are plainly visible throughout these lakes. Strenuous efforts have been made by the owners of shore property to in some way protect their shores. Banks are lined with dead trees, logs, rocks, and *débris* in an effort to prevent the shore line from being obliterated. The shore is not only being gradually taken away, but in places the erosion caused by the variation in level is sufficient to cause the receding of the shore line several feet at a time. During the year the water level has been maintained as high as ten feet. At this level there is no shore line, and the disastrous effects upon shore property are only too plainly visible. When the banks give away, large trees fall into the water. In one instance, thirty large green timber trees were counted lying in the lake where the shore had been taken away this year.

"The great damage done to the property owners along the lakes is through the variation in levels and the action of ice and frost. When the level is at ten feet heavy winds cause especially disastrous effects, as there is no shore at that level to protect the banks, which are mainly of a sandy composition and easily washed away. In places the old shore lines have

disappeared leaving perpendicular embankments ten, twelve, and fifteen feet high. The gradual disappearance of what are now islands was fully shown by the testimony. It was also testified that a variation in level desired to be maintained by the company had disastrous effects on the fish and spawn. As the water is extended over large areas, at times of maximum level, the fish extend over these lands, and when the levels are lowered are either caught there or their spawn is left there and destroyed. In consideration of these facts, property owners vigorously protest that the *Commission* should fix levels which will in a measure protect their property, and it seems clear that with the variation and maximum level now maintained they are unable with all their efforts to protect the same.

"On the other hand it is claimed by the company that they are authorized to maintain a reservoir on these lakes, that the act authorizing the reservoir in express terms stated that the *Commission* should allow such levels as would tend to bring about a constant flow in the level below the dam; that the act provided for condemnation proceedings in case it was necessary to secure rights of flowage, and that it was not the intention of the legislature that the *Commission* should do otherwise than allow the highest maximum level for reservoir purposes that was consistent with safety in maintenance and which the company might desire. It will be seen, therefore, that the questions presented are whether the *Railroad Commission* is authorized, in fixing the levels which it will allow the company to maintain, to take into consideration the property rights of those who will be affected by the levels fixed, and if they are to take into consideration such property rights and consider the great value of water storage and also the large investment in property on the Manitowish waters, what levels should the *Commission* say are proper levels?"

The *Commission* concluded that they were authorized and required, in fixing levels, to take into consideration the rights of riparian property owners on the lakes, the damage done to such property, and the injury to fishing, and that the interests of public welfare and the protection of property required that the levels maintained at the dam be limited as before indicated.

Charles McPherson, attorney, and *George D. Van Dyke,* of counsel, for the appellant.

For the respondent there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

Winslow, C. J. It was frankly admitted by appellant's counsel upon the oral argument that by organizing under and accepting the rights and privileges granted by the water-reservoir act (ch. 640, Laws 1911) the appellant had submitted to such supervision and control by the *Railroad Commission* as that act (under reasonable and proper construction) provided for, but it was strenuously contended that the present order was not within the powers granted to the *Commission* by the act, or, if within the powers nominally granted, that such powers could not be constitutionally granted, for various reasons which will be discussed in this opinion.

The first question which naturally presents itself in the case is whether ch. 640 authorizes the *Commission* to consult the property interests of riparian owners upon the reservoir lakes, and make an order fixing levels at a height which will arbitrarily reduce the reservoir capacity, simply for the purpose of preventing injury to said riparian property. The argument is that the law has one dominant and controlling purpose, namely, the creation of reservoirs at the headwaters of the rivers named, for the purpose of accumulating great stores of water in wet periods and gradually letting it out during dry periods, so that there may be as nearly as practicable an uniform flow of the rivers, thus doing away with disastrous floods and insuring to water-power owners below a supply of water during the entire year.

The argument is well and strongly made. Certainly, this must be conceded to be the primary purpose. There is, however, language that seems to indicate that the storage of water in as large quantities as possible is not the sole purpose, but that the legislature had also in mind the general welfare on

all of the waters covered by the act; and by "all of the waters" we mean not merely the Chippewa and Flambeau rivers proper, but also the small lakes in question here which abound at their headwaters, and really are merely enlargements of the rivers themselves. Thus the title to the act declares that the reservoirs to be constructed are for the purpose of producing a uniform flow of water in the rivers named and their tributaries "and thereby improving the navigation *and other uses* of said streams and *diminishing the injury to property* both public and private." Again, at the close of the first subdivision of sec. 1 power is given to clean out, deepen, or otherwise improve any of the rivers or tributaries in order to improve the navigation thereof *and to prevent injury to property* bordering on said waters. So at the close of sub. 1 of sec. 2, after stating the fundamental purpose of the authority granted, there is added, "the purpose of improving the usefulness of said streams for *all public purposes,* and of diminishing the damage and injury by floods and freshets *to property, both public and private,* located along said waters;" while in the second subdivision of the section it is made the duty of the plaintiff to so operate its works "that the purposes aforesaid shall be accomplished to the greatest practical extent and so that as nearly a uniform flow of water as practicable shall be maintained at all times and at all points . . . ; and during the times when it may be found impracticable to maintain at the same time such uniform flow of water throughout the entire length of said rivers, the upper portions of said rivers shall be given preference."

There seem in these provisions to be quite plain indications that the legislative thought included other public purposes than the mere storage of immense quantities of water for creation of power, and that it was appreciated that there might well arise a conflict between the various purposes, in which event all the public interests were to be recognized and protected so far as practicable.

We do not find it necessary, however, to decide this ques-

tion. While this application was pending before the *Railroad Commission* ch. 380 of the Laws of 1915 was passed, and it was stipulated that the *Commission* might proceed to a determination of the matter with the same effect as if the proceeding had been commenced after that act became effective. We have therefore to consider the effect of that act (sec. 1596—2, Stats. 1915), the material portions of which have already been set out in the statement of facts.

It will be remembered that the right to repeal or amend at any time was specifically reserved in the law under which the plaintiff was organized and is acting, viz. ch. 640, Laws 1911. It is true that repeals by implication are not favored and that acts directed to a special subject are generally to be given effect rather than a general act; yet it is equally true that where the legislative intent to make the general act controlling is apparent it will be given that effect. *Gymnastic Asso. v. Milwaukee,* 129 Wis. 429, 109 N. W. 109. In the present case the act of 1915 seems unquestionably intended to apply to all dams in the state. A general policy applicable to all the navigable waters of the state was there announced, and we can entertain no doubt of the intention to make it applicable to the reservoir dams operated by the plaintiff. This act gives ample and broad powers to the *Commission* to regulate and control the navigable waters of the state and to fix the maximum and minimum levels that may be maintained "by any dam heretofore or hereafter constructed" "in the interest of the public rights" or "to promote safety and protect life, health and property."

Here the legislature has performed the legislative function by declaring that water may not be maintained in any dam in navigable waters at a level which is injurious to the public rights in such waters, or which threatens safety, or imperils life, health, and property. Having enacted this general law, the legislature has endowed the *Railroad Commission* with power to investigate and ascertain the facts and to make

such regulations and orders as may be necessary to carry into effect the law in concrete cases.

That this may be lawfully done, and that legislative power is not thereby delegated nor judicial power conferred, are propositions too well established to admit of doubt. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209. It has always been and still is the function of a jury to fix the reasonable height of a dam erected under the general milldam law (ch. 146, Stats.), and it has never been supposed that in exercising this function a jury was exercising legislative power.

The question arises whether the plaintiff has shown itself possessed of any vested property rights under and by virtue of the Henry franchise, and its purchase of the dam from the assignee of Henry, which have been specifically preserved under the provisions of sub. 2, sec. 1, ch. 640, aforesaid. This section in effect preserves to the plaintiff, on its purchase of an existing dam, all franchises and flowage rights, either perfected or inchoate, possessed by the former owner at the time of the sale. It may be noted in passing that two typographical errors appear in this section as printed in the session laws. The writer has examined the original act as preserved in the office of the secretary of state and has caused the section to be correctly printed in the statement of the case herein, the two words which are erroneously printed in the session laws being printed in italics in the statement.

It seems very clear that the burden of proof is on the plaintiff to show that it possessed such rights with relation to the dam in question. There would be no presumption in its favor. We are well satisfied that the plaintiff did not show that its assignor possessed the necessary flowage rights to entitle it to maintain this dam for reservoir purposes, either by condemnation, ownership of the flowage lands, or by prescription. So far as condemnation is concerned there was an en-

tire absence of evidence. As to ownership by purchase, one witness testified that the Chippewa Lumber and Boom Company owned land abutting on the reservoir, that it bought about 4,200 acres there in 1900, and that when it sold the lands it reserved flowage rights. How much of this land abutted on the reservoir is nowhere stated, and it appears affirmatively that there are large tracts of overflowed riparian property owned by third persons. The possession of flowage rights on a part of the shore certainly gives no right to flood that part of the shore owned by others. It may be remarked that the plaintiff obtained its title to the dam from the *Chippewa River Improvement and Log Driving Company,* and that it is established in the case that this latter company purchased the franchise of Henry in 1888 and built the dam owned by it until 1912, when it was purchased by the plaintiff. Nowhere does it appear that the *Chippewa Lumber and Boom Company,* which is said to have owned the flowage rights, ever owned the dam or transferred any rights to the plaintiff. However, we assume that this is a mere confusion in names and that in fact the plaintiff's grantor is the corporation which was the owner of the flowage rights testified to by the witness.

But it is said that rights of flowage have been obtained by prescription which are preserved to the plaintiff by the section of ch. 640 last quoted. In considering this claim it is always to be borne in mind that prescriptive rights in an easement are commensurate only with the actual enjoyment of the easement. Angell, Watercourses (7th ed.) §§ 224, 379; Washburn, Easem. & S. (4th ed.) 135; 14 Cyc. 1200; *Koenigs v. Jung,* 73 Wis. 178, 40 N. W. 801; *Darlington v. Painter,* 7 Pa. St. 473; *Hart v. Chalker,* 5 Conn. 311.

If the water of a dam is kept up only during certain months of the year for the full period necessary to create a prescriptive right, the owner of the land being in possession at all other times, no right will be thereby acquired to keep the wa-

ter up during the remaining months. *Carlisle v. Cooper,* 21 N. J. Eq. 576; *Marcly v. Shults,* 29 N. Y. 346. The resulting prescriptive easement is confined to the months during which the level has been maintained. *Swan v. Munch,* 65 Minn. 500, 67 N. W. 1022.

The idea is that the adverse use of land for a certain three months of each year for a series of years, while it may give a prescriptive right for those months, does not give any prescriptive right during the other nine months of the year.

A log-driving dam is not built for storage purposes or for keeping a constant head of water during the year, but for the raising of a head of water in the early spring and immediately using such water in successive rapid miniature floods during the spring months. The reservoir dam is built for the purpose of storing up a great quantity of water during the spring and conserving it for gradual depletion during the summer season. In the one case the normal situation is that the dam is empty at the beginning of the summer and so remains, while in the other case it is full at the beginning of the summer and remains so, subject only to slow reduction when it becomes necessary to supplement the natural flow of the river which has become lessened by long continued dry weather. These uses are practically the antitheses of each other. The testimony in this case affirmatively shows that during the busy logging years and up to 1901 the water in the dam reached the maximum head of about sixteen feet in April and by the 1st of July was down nearly or quite to the natural level. Sometimes there was some accumulation of water during the summer, but only in case the summer was wet, and even in that case it does not appear that during the summer mon ths any head exceeding eight feet and six inches was ever reached, much less maintained. The testimony also shows practically the same condition from 1901 until 1912. During the earlier years of this later period the maximum level reached in April was about thirteen feet and during the later

years about ten or eleven feet. From July 1st to October or November the water was generally drawn down nearly or quite to its natural level, while the level during the rest of the year does not appear.

The plaintiff contends that the purpose of ch. 640, Laws 1911, is (quoting from the brief) "that the flow of water in the river below the reservoir shall be kept as nearly uniform as practicable at all seasons of the year." Granting that this is the purpose, it is plain that the supposed prescriptive right of flowage does not in any way help to attain that purpose, but is in fact inconsistent with its attainment. To accumulate water in April in order to expend it riotously in May and June is absolutely destructive of the usefulness of the dam as a reservoir. The plaintiff is here as the owner of a reservoir dam, not a log-driving dam. It claims that this dam is devoted to "a specific public use, *i. e.* obtaining as nearly as possible a uniform flow of water in the Flambeau and Chippewa rivers below the dam." To attain this public purpose it must necessarily store up water in wet seasons in order to gradually dole it out in long periods of drouth. If any prescriptive rights to flow lands were obtained by the owners of the dam before its purchase by the plaintiff they were not rights to do this, but rights to acquire a maximum head of water in April and reduce it to zero by July 1st.

By accepting its charter the plaintiff doubtless bound itself to carry out the purposes of that charter. The prescriptive right which it now claims is a right which, if exercised in accordance with the use upon which it is based, would destroy the usefulness of the dam for the charter purposes, hence it can avail the plaintiff nothing.

It does not seem necessary to say more. When it is held that plaintiff's charter (ch. 640, Laws 1911) was amended by ch. 380, Laws 1915, it necessarily follows, as it seems to us, that the *Commission* in making its order might rightfully consider the interests of riparian property owners on the reser-

voir area; and when it is held that no prescriptive rights were obtained by the plaintiff when it purchased the dam which can interfere with the order, it seems that all questions as to the supposed taking of property without due process of law disappear. As already indicated, there is in our judgment no invasion of legislative or judicial power in the making of the order, and we are unable to say that the order is in any way unreasonable.

By the Court.—Judgment affirmed.

STATE EX REL. OWEN, Attorney General, Respondent, vs. REISEN, Appellant.

September 16—October 24, 1916.

Courts: Jurisdiction: Statute construed: Nuisances: Abatement: Place of trial: Prejudice of judge.

1. Ch. 339, Laws 1915, conferring upon the county court of Iowa county the jurisdiction therein specified, did not give that court jurisdiction of an action under sec. 3180*a*, Stats., to abate a public nuisance. *Winchell v. Waukesha*, 110 Wis. 101, distinguished.
2. The words "claims, demands and sums" in sec. 1, ch. 339, Laws 1915, relate to claims arising on contract.
3. An order of a circuit court, based on an affidavit of prejudice of the judge, changing the place of trial of an action to a county court which had no jurisdiction thereof, was a nullity, and jurisdiction remained in the circuit court.

APPEAL from an order of the county court of Iowa county: ALDRO JENKS, Judge. *Reversed.*

For the appellant there was a brief by *Richmond, Jackman & Swansen* and *J. D. McGeever,* and oral argument by *Sam T. Swansen, J. D. McGeever,* and *William C. McGeever.*

For the respondent there was a brief by *Crownhart & Wylie* and *Fiedler & Fiedler,* and oral argument by *F. M. Wylie* and *E. C. Fiedler.*

Kerwin, J. In this case a preliminary question is raised as to the jurisdiction of the court, which if resolved in favor of the appellant disposes of the case.

This action was brought to abate a nuisance under sec. 3180*a*, Stats. The action was originally commenced in the circuit court and on affidavit of prejudice was changed to the county court of Iowa county. It is contended that the county court of Iowa county has no jurisdiction of the subject matter of the action.

The statute conferring jurisdiction upon said county court (ch. 339, Laws 1915) reads:

"Section 1. There is hereby conferred on the county court of Iowa county, jurisdiction in all civil actions and proceedings in law and in equity, concurrent with and equal with the jurisdiction of the circuit court in said county, for all claims, demands and sums and to and concerning all property, not exceeding the sum or value of twenty-five thousand dollars; provided, that said county court shall have jurisdiction in all actions in said county for the foreclosure of mortgages and mechanic liens, in which the amount claimed does not exceed the sum above mentioned, although the property to be affected by the judgment exceeds the sum of twenty-five thousand dollars in value; and of all actions for divorce or for affirmance or annulment of marriage contracts; and all actions for removing clouds and quieting title to real estate and all actions for partition of real estate; and in all bastardy actions and in all criminal cases except murder, manslaughter and homicide; and to the amount and within the limits aforesaid the said county court shall be a court of general jurisdiction, with the same power and jurisdiction in all civil and criminal actions and proceedings, and including the power of review of records on *certiorari,* discharging mortgages of records, and such other special powers as are now or may hereafter be conferred by the statutes upon the circuit court, coming within the above limitations, as belong to and are exercised by the circuit court in and for said county." . . .

The question presented is whether this act gives the court jurisdiction of the instant action. This statute seems to provide for five classes of cases: First, jurisdiction in civil ac-

tions and proceedings in law and equity concurrent with the circuit court "for all claims, demands and sums and to and concerning all property not exceeding the sum or value of twenty-five thousand dollars." Second, actions for the foreclosure of mortgages and mechanics' liens in which the amount claimed does not exceed twenty-five thousand dollars, although the property to be affected exceeds that sum. Third, actions for divorce or for annulment or affirmance of marriage contracts. Fourth, all actions to remove clouds and quiet title to real estate and for partition of real estate. Fifth, bastardy and criminal cases, except murder, manslaughter, and homicide. After reciting the foregoing jurisdiction the act provides, "and to the amount and within the limits aforesaid the said county court shall be a court of general jurisdiction, . . ."

It will be seen from the foregoing classification that the legislature specified with particularity the jurisdiction conferred. We do not think the instant case falls within any of the heads above specified. It does not seem to be included under the first head, "claims, demands and sums." This court has repeatedly held that "claims or demands," as used in laws relating to claims against cities, relates only to claims arising on contract. *Mason v. Ashland,* 98 Wis. 540, 74 N. W. 357; *Bradley v. Eau Claire,* 56 Wis. 168, 14 N. W. 10; *Kelley v. Madison,* 43 Wis. 638.

The cause of action set up in the complaint is provided for under a statute, sec. 3180*a,* to enjoin a public nuisance, and the statute provides that it may be commenced and prosecuted in the circuit court in the name of the state either by the attorney general upon his own information, or upon the relation of a private individual having first obtained leave to commence and prosecute the action. It seems, if the legislature intended that the county court of Iowa county should have jurisdiction of such actions, mention would have been made of it as well as the various other classes of actions which were particularly mentioned.

Of course the county court of Iowa county cannot exercise jurisdiction not conferred by statute. The particular specification of jurisdiction conferred in certain cases excludes the idea that the legislature intended to confer jurisdiction in other cases. An action to abate a nuisance does not fall within any of the classes specified in the statute. If the legislature intended to confer general jurisdiction upon the county court of Iowa county in all cases where the amount involved did not exceed $25,000, it was easy to say so.

Counsel for respondent relies upon *Winchell v. Waukesha*, 110 Wis. 101, 85 N. W. 668. In that case the act (ch. 1, Laws 1899) conferring jurisdiction was quite different from the act conferring jurisdiction under consideration in the instant case. Moreover, in the *Winchell Case* the particular question involved here was not considered, the point considered being whether the amount involved exceeded $25,000.

The court is of opinion that the county court of Iowa county had no jurisdiction of the action, therefore the order appealed from must be reversed.

The county court having no jurisdiction, the order of removal had no effect, and the case remained in the circuit court. We are therefore of opinion that the case must be remanded to the county court with directions to transfer the record to the circuit court for further proceedings in that court; and that all proceedings taken after the filing of the affidavit of prejudice were a nullity; that the circuit court now has jurisdiction and should proceed as if the affidavit were presently filed.

By the Court.—The order of the court below is reversed, and the cause remanded to the county court with directions to immediately transfer the record to the circuit court for Iowa county for further proceedings according to law and in conformity with this opinion. No costs are to be allowed either party, except that appellant pay the clerk's fees in this court.

STATE EX REL. OWEN, Attorney General, Respondent, vs. O'NEILL, Appellant.

September 16—October 24, 1916.

State ex rel. Owen v. Reisen, ante, p. 123, followed.

APPEAL from an order of the county court of Iowa county: ALDRO JENKS, Judge. *Reversed.*

For the appellant there was a brief by *McGeever & McGeever* and *Platt Whitman*, and oral argument by *Sam T. Swansen, J. D. McGeever*, and *William C. McGeever.*

For the respondent there was a brief by *Crownhart & Wylie* and *Fiedler & Fiedler*, and oral argument by *F. M. Wylie* and *E. C. Fiedler.*

KERWIN, J. This case is ruled by *State ex rel. Owen v. Reisen, ante*, p. 123, 159 N. W. 747.

By the Court.—The order of the court below is reversed, and the cause remanded to the county court with directions to immediately transfer the record to the circuit court for Iowa county for further proceedings according to law and in conformity with this opinion. No costs are to be allowed either party, except that appellant pay the clerk's fees in this court.

STATE EX REL. OWEN, Attorney General, Respondent, vs. CONWAY, Appellant.

September 16—October 24, 1916.

State ex rel. Owen v. Reisen, ante, p. 123, followed.

APPEAL from an order of the county court of Iowa county: ALDRO JENKS, Judge. *Reversed.*

For the appellant there was a brief by *McGeever & McGeever* and *Platt Whitman*, and oral argument by *Sam T. Swansen, J. D. McGeever*, and *William C. McGeever.*

For the respondent there was a brief by *Crownhart & Wylie* and *Fiedler & Fiedler*, and oral argument by *F. M. Wylie* and *E. C. Fiedler.*

KERWIN, J. This case is ruled by *State ex rel. Owen v. Reisen, ante*, p. 123, 159 N. W. 747.

By the Court.—The order of the court below is reversed, and the cause remanded to the county court with directions to immediately transfer the record to the circuit court for Iowa county for further proceedings according to law and in conformity with this opinion. No costs are to be allowed either party, except that appellant pay the clerk's fees in this court.

SCHMIDT, Appellant, vs. TOWN OF FRANKLIN, Respondent.

October 3—October 24, 1916.

Highways: Injuries from defects: Contributory negligence: Questions for jury.

1. **A person knowing the defective condition of a highway may nevertheless use it, even after dark, without being guilty of contributory negligence as a matter of law.**
2. **Contributory negligence is a defense which must be affirmatively established, and the question is ordinarily one for the jury.**
3. **Whether a woman who, while traveling over a highway which she knew was defective, was thrown from the seat on top of a high wagon box when the wheels of the wagon suddenly plunged into a hole, was guilty of contributory negligence in using such seat, is *held* to have been a question for the jury, it appearing that the seat was the ordinary one used on wagons of like character.**
4. **The whole question of contributory negligence in such case was for the jury, there being conflicting evidence from which different inferences might be drawn.**

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This is an action to recover damages for injuries alleged to have been caused by a defective highway in the defendant town. The complaint charges that on November 26, 1912, at about 6 p. m., while plaintiff and her daughter were riding in a farm wagon drawn by two horses over the highway in question, the wheels of the wagon suddenly plunged into a hole or depression in the traveled part of the road with such force as to throw plaintiff from the seat to the ground; that the defective condition of the highway existed for several months prior to said date and was known to defendant town and its officers. By its answer defendant denied liability and alleged carelessness and negligence on the part of plaintiff. The case was tried originally in the civil court of Milwaukee county, where a jury by special verdict found in favor of the plaintiff and assessed her damages at $2,000, and judg-

ment was entered in accordance therewith. From this judgment the defendant appealed to the circuit court, where an order was entered setting aside and vacating the verdict and the judgment of the civil court and granting a new trial in the circuit court, and from this order plaintiff appeals.

Albert M. Kelly, for the appellant.

For the respondent there was a brief by *Schmitz, Wild & Gross,* and oral argument by *Robert Wild.*

ROSENBERRY, J. The circuit court ordered a new trial on the ground that the contributory negligence of the plaintiff was established as a matter of law.

If there was credible evidence which supported the verdict of the jury the circuit court was clearly wrong in setting aside the judgment and granting a new trial. It was established beyond controversy that the highway in question had been out of repair and insufficient for so long a time as to charge the defendant town with notice of the defects. On the part of the plaintiff there was evidence which tended to show that the road was generally insufficient and out of repair, not only at the point where the accident occurred, but from eighty to one hundred rods on either side; that the mudhole in question was from three to five feet long, three to five feet wide, and from sixteen to twenty inches in depth in the center of the highway, and was one of a series of mudholes of varying sizes; that at the time of the accident it was dark; and that plaintiff was riding on an ordinary lumber wagon having a seat on a top box. There is nothing to show that a traveler passing along the highway could by any observation made from his vehicle determine the depth of the hole. The driver testified that she observed the defective condition of the highway in the morning and had it in mind when returning in the evening. The accident was caused by the front wheel of the wagon dropping into the hole, which resulted in throwing plaintiff to the ground. The road was described as a very bad piece of road with deep holes; some of the wit-

nesses testified that it was practically impossible to avoid them even in the daytime; and on the part of the defendant there was testimony tending to minimize the defects.

One knowing the defective condition of a highway may nevertheless use such highway, even after dark, without being guilty of contributory negligence as a matter of law. *Hart v. Red Cedar,* 63 Wis. 634, 24 N. W. 410; *Spearbracker v. Larrabee,* 64 Wis. 573, 25 N. W. 555; *Petrich v. Union,* 117 Wis. 46, 93 N. W. 819; *Luedke v. Mukwa,* 90 Wis. 57, 62 N. W. 931.

It is claimed also that plaintiff was guilty of contributory negligence in that she rode on the top of a high wagon box and that the seat was not one proper to be used under such circumstances. It appearing that it was the ordinary seat used on wagons of like character, under former decisions of this court this question was also for the jury. *Jennings v. Albion,* 90 Wis. 22, 62 N. W. 926; *Hammond v. Mukwa,* 40 Wis. 35; *Petrich v. Union, supra.*

Plaintiff not being guilty of contributory negligence in using the highway, although it was known to be defective, the question of whether or not under all the facts and circumstances she was guilty of contributory negligence was clearly one for the jury. Contributory negligence is a defense which must be affirmatively established, and ordinarily is a question for the jury. *Marlow v. Fond du Lac,* 141 Wis. 74, 123 N. W. 627, and cases cited *supra.*

Plaintiff not being guilty of contributory negligence as a matter of law, and there being conflicting evidence from which different inferences might be drawn, the question was properly submitted to the jury by the civil court, with full instructions as to the duty of the plaintiff and her daughter who was driving at the time of the accident. The fact that the driver gave her full attention to her driving and that her attention was not diverted was one fact among others which the jury was required to take into consideration in determining the question of contributory negligence. In this case the

defect was not of such a character that one in the exercise of the usual powers of observation must have seen and therefore have avoided it. A mere inspection did not disclose its dangerous character, therefore the rule as to momentary diversion of the attention had no application. Cases cited.

In *Petrich v. Union,* 117 Wis. 46, 93 N. W. 819, it was said that it was for the jury to say whether or not the plaintiff was guilty of contributory negligence because she did not keep in mind the defective condition of the highway. If it may be negligence not to have it in mind, it certainly cannot be negligence as a matter of law to have it fully in mind. The degree of care must be commensurate with the risks taken. The whole question in this case was clearly for the jury. The jury having found that plaintiff was not guilty of contributory negligence, and there being credible evidence to support the finding, the verdict should have been allowed to stand.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to enter judgment affirming the judgment of the civil court.

ESCHWEILER, J., took no part.

SCHOENWETTER, Respondent, vs. SCHOENWETTER, imp., Appellant.

October 3—October 24, 1916.

Executors and administrators: Personalty: Equitable title of heirs or legatees: Estoppel: Bills and notes: Consideration: Rights of accommodation maker: Wills: Probate.

1. **Although the title to personal property of a decedent goes to the executor or administrator, the legal heirs or legatees possess the equitable title subject only to the expenses of administration and the payment of debts.**

2. One cannot deny a representation which he has made, when by such denial injury would result to another who, having the right to do so, has relied on the representation and based his own conduct thereon.
3. Where, without probate proceedings but pursuant to an agreement in writing among all persons (except possible creditors) interested in the estate of a decedent, one of the heirs, who had possession of the property, executed a note for the value thereof, signed also by an accommodation maker, to a trustee who was to collect the same and divide the money among the heirs, and said heir retained the property to his own use until the note became due four years later, both makers of the note are estopped to assert that it was not valid or was without consideration.
4. No judgment on such note in favor of the trustee could affect the rights of an administrator or executor if one should thereafter be appointed; and before distributing the proceeds of such judgment the trustee should ascertain whether there was a will and, if so, cause it to be probated.
5. Neither presentment of a note for payment nor notice of dishonor is necessary to charge an accommodation maker with liability.

Appeal from an order of the circuit court for Milwaukee county: Lawrence W. Halsey, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining a general demurrer to the answer of the defendant *Lewis F. Schoenwetter* in an action upon a promissory note of $3,800 executed by the defendant Barney A. Schoenwetter and the appellant, *Lewis F. Schoenwetter,* as joint and several makers and payable four years after date to the plaintiff, *Edward A. Schoenwetter,* "as trustee of the estate of Louise Schoenwetter, deceased."

It appeared by the complaint that the plaintiff had not been appointed trustee by any court, but that he was made a trustee by an agreement, of the same date as the note, executed by all the children and heirs at law, ten in number, of one Louise Schoenwetter, deceased, the plaintiff and the defendant Barney being among said heirs but not the appellant, *Lewis.* This agreement, after reciting the fact of the death of Louise and the desire of the parties to settle her estate without legal

proceedings, states that the estate of the deceased consists of the sum of $3,800, represented by notes and mortgages of that amount "executed to and held by Barney A. Schoenwetter;" that the balance of the estate, after payment of the funeral expenses, is $3,563.27; that the expenses of a headstone and an abstract, as well as the sum of $50 for a cemetery lot, are yet to be paid; that it is agreed that *Edward* be appointed trustee of the estate of Louise to collect the assets, to make the payments still to be made and divide the balance between the parties in equal shares, and that Barney execute and deliver to *Edward* as trustee his secured promissory note for the sum of $3,563.27 (being the balance of the estate after deducting the funeral expenses). The agreement closed with a power of attorney by all of the heirs empowering *Edward* to collect the note and make division of the money among the heirs. The note, as before stated, was executed on the same day and was for the sum of $3,800, but was indorsed on that day with a payment of $236.73, leaving a balance of $3,563.27. Interest falling due April 15, 1911, is indorsed upon the note as paid.

By the first defense in the answer the defendant *Lewis* alleged that he was in fact a surety and not a maker of the note, to the knowledge of the plaintiff, and received no consideration therefor, that the note was not paid at its maturity, and that no demand of payment was made on him, nor did he receive timely notice of the nonpayment thereof. By the second defense it is alleged that neither Barney nor appellant received any consideration for the note nor was either of them indebted to the plaintiff. By the third defense it is alleged on information and belief that Louise died testate, having by will disposed of her property "in various amounts to various of her children," and that hence the liability of the defendant Barney to his mother is only due to the executor or lawful personal representative of the deceased Louise, and not to the plaintiff.

For the appellant there was a brief by *Jeger & Klingelhoefer* and *Spencer Haven,* and oral argument by *Mr. Lawrence M. Jeger* and *Mr. Haven.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Howard T. Foulkes,* of counsel, and oral argument by *Mr. Foulkes.*

Winslow, C. J. The pleadings show that all the persons beneficially interested in the estate of Louise Schoenwetter (whether she died testate or intestate), with the exception of possible creditors, agreed that *Edward* should collect the assets and distribute them, and for that purpose should accept from Barney, in place of the property of Louise in his hands, the present note; that more than four years elapsed after the making of that agreement and note before the commencement of this action; and that there have never been any probate proceedings instituted for the settlement of the estate.

It is well settled that heirs obtain no legal title to personal property by the death of the ancestor, but that the title goes to the executor or administrator. Citation of authorities is unnecessary on this proposition. Legal heirs or legatees, however, are beneficially interested in the estate, and they doubtless possess the equitable title subject only to the expenses of administration and the payment of debts. *McKeigue v. C. & N. W. R. Co.* 130 Wis. 543, 110 N. W. 384.

Nothing they could do would affect the right of a creditor to procure the appointment of an administrator of the estate, or the duty to probate the will (if one exists), but no reason is perceived why the parties now before the court should not be bound by their agreement on well established principles of estoppel. By virtue of the agreement and note Barney has retained to his own use the property of the estate for more than four years. Had these papers not been executed, probate proceedings would unquestionably have been commenced by the other heirs and he would have been required to turn

over the property to the legal representative years ago. Relying on this note as a valid obligation, the other heirs have lost the possession and enjoyment of their shares of the estate for several years. The makers cannot now say that it is not valid. One cannot deny a representation which he has made, when by such denial injury would result to another who, having the right so to do, has relied on the representation and based his own conduct thereon. It is clear that both defendants are estopped from asserting the defense of lack of consideration.

The appellant was liable as maker to the plaintiff notwithstanding he was only an accommodation party. Sec. 1675—55, Stats. (Negotiable Instrument Law). Being a maker, neither presentment for payment nor notice of dishonor was necessary in order to charge him with liability. Sec. 1678, Stats.

No judgment rendered in this case can affect the rights of an administrator or executor if one should hereafter be appointed by the proper court. If there be a will in existence it should be at once probated. No one has any right to suppress or change the terms of a will. *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778. It would be the part of wisdom for the plaintiff, in case he recovers in this action, to take measures to ascertain certainly whether there is a will and, if there be one, cause the same to be probated, before disposing of the proceeds of the judgment.

By the Court.—Order affirmed.

WILL OF MENDEL: KUOLT, Commissioner of Banking, Appellant, vs. KAUFER and others, imp., Respondents.

October 3—October 24, 1916.

Trusts: Creation by will: Construction: Intention of creator: Investment of trust fund: "First class interest-bearing real-estate mortgage securities:" Diversion of fund: Remedies: Election.

1. **A trust must be executed according to the plan of its creator, and the language thereof, if not perfectly plain, must be so construed, if practicable, as to carry out the creator's intent as evidenced by all the circumstances characterizing the trust.**
2. **Where a will created a trust fund and directed its investment in "first class interest-bearing real-estate mortgage securities," the testator's intention was to confine the investments to mortgages wholly owned by the trustees and held by them for the sole benefit of the trust fund; and it was a violation of the trust to invest any part of the fund in mere participating certificates or bonds entitling the trustees to share with others in the mortgage security.**
3. **For such a violation of the trust, claim may be made and a recovery had against the offending trustee for the amount wrongfully diverted from the trust fund, and the successor of such trustee may proceed upon the theory that the securities so wrongfully taken are the property of the trustee who took them but are subject to an equitable lien in favor of the trust fund to secure, so far as they will, his liability for the diversion. Such proceeding does not involve inconsistent remedies between which an election need be made.**

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Action to charge a trustee with money alleged to have been loaned in violation of the trust.

The trust was created by the will of Jacob Mendel, deceased. It was for the benefit of his widow and others. The fund which came to the possession of the trustee was about $70,000. The power in respect thereto, so far as relates to this action, was thus stated in the will: "I direct my executors and trustees to convert, as early as practicable, all my

property into first class interest-bearing real-estate mortgage securities and keep the same so invested." A Milwaukee, Wisconsin, institution under the name of Citizens Trust Company, for a time, and then Citizens Savings and Trust Company, and the widow, *Mary Mendel,* were the trustees for several years prior to October, 1913, during which time the loans out of the trust fund which are involved in the action were made. The Trust Company did all the business. At the end of such time it resigned and *Jacob Kaufer* was duly substituted. In a contest in the county court of Milwaukee county, as to whether the trust had been violated in respect to several loans which had been made, the decision was in the affirmative as to $21,568.79. The contest arose in the settlement of the Trust Company's account after it resigned. On appeal to the circuit court, objections were withdrawn leaving contested loans, aggregating $10,500, for which, with interest, judgment went against the Trust Company. About the time it resigned, it was discovered to be insolvent and the commissioner of banking took possession of its business and affairs, under sec. 2022, Stats. He was made a party to the action and appealed from the judgment.

In the circuit court these were the matters forming the subjects of controversy: A $6,500 investment in bonds of the Zoehrlaut Leather Company, an investment in a participating certificate of $1,000 in a mortgage indebtedness of the Hamilton Realty Company, and an investment of $3,000 in the bonds of the Clark Realty Company. It was conceded that the investment in the bonds of the Clark Realty Company was in violation of the trust because the security, in part, was on leasehold property.

The investment in the Herman Zoehrlaut Leather Company indebtedness was in first-mortgage bonds of such company, out of an issue of $250,000 of such bonds, dated February 5, 1905, payable in ten years, and bearing interest at the rate of five per cent. per annum, payable semi-annually.

The mortgage was in the form of a trust deed to the Trust Company of the real estate and buildings, including machinery of the mortgagor and its after-acquired real estate and machinery. Such property consisted of a tannery plant. The bonds, in form, acknowledged an indebtedness to the Trust Company and were payable to bearer. The trust deed contained ordinary provisions for the protection of bondholders. The property was situated in Milwaukee, Wisconsin, and was used for the purposes of the mortgagor from the date of the trust deed until the mortgagor became bankrupt in 1913. It then defaulted in payment of interest and, in due course thereafter, judgment of foreclosure of the trust mortgage was rendered, the indebtedness being fixed at $278,139.48. At the time of the judgment appealed from, whether there would be a deficiency had not been determined.

There was evidence produced by the contestants tending to prove that the value of the land and buildings attached thereto at the date of the trust deed was not more than $175,000. Evidence to the contrary tended to place the value at such time at around $266,000. There was further evidence tending to prove that the value of the lands and building at the time the investment was made was much less than the face of the bonds, but with the fixtures it was largely in excess of it; that the limit of well secured indebtedness, in case of such property, is fifty per cent. of the value of the land and twenty-five per cent. of the value of the building, with no allowance for machinery.

The character of the Hamilton Realty Company loan was this: The mortgage ran to the Citizens Trust Company. One of two persons, who were owners of, practically, the stock of the Trust Company and the stock of the Realty Company, acquired the property by purchase at a foreclosure sale, transferred it to the Realty Company and caused a $4,000 note to be made to the Trust Company, secured by a mortgage to it of such property. The Trust Company then made a paper

certifying that the Mendel estate had a $1,000 interest in such note and mortgage and invested $1,000 of the trust fund therein. The remaining amount of the note and mortgage was likewise disposed of by several like certificates sold to various persons. There was evidence tending to prove that the value of the property was around $6,000, of which $4,500 was represented by the buildings. Judgment of foreclosure of the mortgage was rendered July 6, 1915, but when the judgment in this action was rendered, whether there would be a deficiency had not been determined.

The Trust Company, at the time of the pendency of the action in circuit court, had on deposit with the state treasurer, according to law, $100,000 in securities for the protection of its patrons. In the winding-up proceedings, the trustees of the particular fund filed a claim to recover the loss accruing from investments made by the Trust Company in violation of the trust, it having been determined that the action should be regarded as a proceeding under sec. 2022, Stats., to determine the liability of the Trust Company chargeable to its securities deposited with the state treasurer. There were findings in harmony with the foregoing and particularly to this effect:

(1) Each of the investments was made by the Citizens Trust Company and, as to description and character, is in violation of the trust. (2) The trustees hold the securities under the trust created by the Mendel will and the authority of the court having charge of administering the trust, without prejudice to their right to reject any or all of them, or to enforce them for the purpose of saving the trust fund from depletion, and without ratification of the investments, or prejudice to such liability as might exist against the Trust Company to take back such securities and account for the same and any loss by reason of the violations of the trust. That situation has not been changed by any act or acts of the trustees. (3) *Albert E. Kuolt,* as commissioner of banking, since he

took charge of the insolvent Trust Company, October 2, 1913, has been possessed of its assets. It is without means to make good the loss to the Mendel trust growing out of its violations of duty except so far as the same may be realized by the trustees out of the securities deposited with the state treasurer according to law. A claim for the improperly used fund was seasonably filed in the settlement proceedings of the insolvent corporation, which claim was rejected and due notice thereof served on the trustees. Action upon such claim was seasonably commenced in the circuit court for Milwaukee county, having charge of the settlement proceedings, in that it has been determined by said court in such proceedings that the institution and prosecution of this proceeding should be deemed as a full compliance with the statute in that regard,—sec. 2022—5, Stats. (4) Proceedings on foreclosure of each of the securities involved in this action are pending. The actions as to the Hamilton Realty Company and Herman Zoehrlaut Leather Company have proceeded to judgment and that as to the Clark Realty Company is about to so proceed. The amount that may be realized in such actions for the improperly taken securities will be known in the course of about one year. (5) The improper investments were made as follows: (a) $4,500 May 10, 1906, in the bonds of the Leather Company, and $2,000 likewise November 1, 1909; (b) $1,000 March 29, 1910, in the participating interest in the Hamilton Realty Company loan; (c) $1,000 July 8, 1909, in the bonds of the Clark Realty Company, and $2,000 December 30, 1910, in such bonds. (6) Such investments are wholly unpaid except interest at the rate of five per cent. per annum, November 1, 1913, on the Leather Company bonds; to May 1, 1914, on the Hamilton Realty Company certificate; and to May 1, 1913, on the Clark Realty Company bonds.

Upon such facts this was held: The Trust Company is chargeable with the principal of, and unpaid interest on, each of the investments. The commissioner of banking is a party

in interest. The Trust Company should be required to pay to the trustees the amount with which it is chargeable as stated and they are entitled to recover the same, accordingly, in the settlement of its account as a trustee of such fund, subject to allowance in the manner provided by law, as a claim in the settlement proceeding of such company under the administration of the banking commissioner. Upon payment thereof, the securities improperly taken should be surrendered to such commissioner. Until such payment, such trustees are entitled to hold such securities, and enforce the same in any proper way on account of the liability of the Trust Company for the wrongfully diverted funds, without prejudice, as regards any claim of ratification of the diversions, or to the right of the trustees to enforce their claim against such company. Such securities are in the hands of such trustees, subject to a lien accordingly. The judgment should be interlocutory and provide for pendency of the cause until payment shall have been made of the liability, adjudged against the Trust Company, so far as practicable, out of such securities, and a report shall have been made accordingly, and the court shall have finally acted in respect thereto. Judgment should go in favor of the commissioner of banking for a recovery out of the assets of the Trust Company in his hands, his costs and disbursements as taxed according to law.

Judgment was rendered in harmony with the foregoing and as before indicated the commissioner of banking appealed therefrom.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *R. N. Van Doren.*

For the respondent *Kaufer* there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *George B. Luhman,* of counsel, and oral argument by *Nathan Glicksman.*

MARSHALL, J. As we understand the findings of the trial court, it was held that, irrespective of whether the character of the securities in which the trust funds were invested was

good, in that payment of principal and interest was amply secured, they were not of the class contemplated by the deceased by the language used in his will,—"I direct my executors and trustees to convert, as early as practicable, all my property and estate into first class interest-bearing real-estate mortgage securities and keep the same so invested." That is, the idea which the creator of the trust intended to, and did, express was that the investment should be made in real-estate mortgage securities, the mortgages in the entirety to be owned by the administrators of the trust for the beneficiaries.

It must be conceded, and is, as we understand it, that if the proper construction of the language of the trust does not include power to place trust funds in bonds secured, with a large issue of such evidences of indebtedness, by a trust deed, nor in a mere evidence of right by one to participate with others in an indebtedness secured by a real-estate mortgage, then the investments in question were wholly unwarranted.

We have reached the conclusion that the circuit court correctly construed the language of the trust. The creator of it meant more, by the words "first class interest-bearing real-estate mortgage securities" than that the securities should be good and of real estate character, in the broad sense of the term. He meant to confine the investments to the narrow class characterized by sole ownership of the entire mortgage indebtedness, so the securities might be enforced by the trustees, if necessary, without regard to any other party interest therein. "First class" was not thought by the creator, would permit his estate to be complicated with rights of any number of persons who might be interested, as creditors, in the mortgaged property. He intended to require mortgages, running to the trustees, or held by them for the sole benefit of the trust fund. Evidently, in his judgment, a mere participating certificate, entitling the trustees, as such, to share with many persons, in a mortgage indebtedness, or a bond entitling them to share with a large number of bondholders, located in

many places throughout the country, and, perhaps, in foreign countries, with many possible efficient difficulties to contend with, in case of necessity to enforce the security, would not answer to the call for first class mortgage securities to be the repository of the trust fund.

As suggested by counsel for respondent, how could trustees of a small trust fund protect the interests of their beneficiaries in case of a foreclosure of a mortgage given to secure $250,000 of indebtedness of which such trustees owned but about four per cent. of it? It would be, practically, an impossibility. That, of itself, would stamp such an investment as far from being "first class" from the viewpoint of such trustees. Again, how could trustees, holding a mere participating certificate, as in this case, protect their beneficiaries, in case of foreclosure of the security, without being required to contend with many difficulties which would preclude regarding the investment as first class for such a trust fund as the one in question?

There does not seem to be any need for prolonging the discussion. It seems very clear that the trial court properly construed the language of the trust. The case turns on what the creator of the trust intended and expressed. No principle of law is involved other than that a trust must be executed according to the plan of its creator, and that the language of the trust, if not perfectly plain, must be so construed, if practicable, as to carry out the creator's intent as evidenced by all the circumstances characterizing the trust. Authorities are unnecessary, for such principles are elementary.

Counsel for appellant contend that the judgment, affording respondents the benefit of the securities, so far as money can be realized therefrom, to restore the trust funds, is inconsistent with the judgment against the guilty trustee for the money improperly diverted,—that appellant cannot have the securities in question and have a judgment for a recovery of the

money invested therein, as well. The difficulty with that is that the judgment does not proceed upon the theory that the title to the securities is in the trustees, or that they are to have them; but rather upon the ground that the securities have been rejected, subject to an equitable lien thereon in favor of the trust fund. We do not perceive any difficulty in that.

This is not a case of following the trust fund into the property in which it has been improperly invested, and claiming such property, and, at the same time, claiming to recover the fund upon personal liability therefor, as in *Rowley v. Towsley,* 53 Mich. 329, 19 N. W. 20, and many other judicial and text-book authorities, cited to our attention. The trustees do not claim the securities. They claim that, in equity, they are entitled to hold them as property of the wrongdoer, charged with a lien to make good, so far as practicable, the damage caused by the wrong. There can be no doubt but what the *cestui que trust,* in such circumstances as exist here, may retain the property and thereby ratify the wrong, or reject it and claim damages for the wrongful investment therein, or claim such damages and charge such property, as belonging to the wrongdoer, with a lien for the damages suffered. We observe nothing to the contrary of this in anything cited to our attention, or anything we can discover. If an authority were found to the contrary, we should be inclined to reject it as wrong on principle.

In reference to the matter under discussion, the rule is thus stated in 2 Story, Eq. Jur. (13th ed.) sec. 1262: "The *cestui que trust* has an option to insist upon taking the property, or he may disclaim any title thereto and proceed upon any other remedies to which he is entitled either *in rem* or *in personam.* But he cannot insist upon opposite and repugnant rights."

So the test here is, Is the judgment for a recovery of damages for the diversion of the trust fund repugnant to the lien thereon as the property of the Trust Company to secure, so far as it will, the company's liability? It clearly does not

seem so. In *Ferris v. Van Vechten,* 73 N. Y. 113, cited to our attention by counsel for respondent, it was distinctly held that, in the circumstances of this case, the property in which the trust funds was improperly invested may be sold as the property of the wrongdoer and the trustees held liable for the deficiency. To the same effect are *Mann v. Benedict,* 47 App. Div. 173, 62 N. Y. Supp. 259; *Holmes v. Gilman,* 138 N. Y. 369, 34 N. E. 205; 39 Cyc. 552.

In the last citation it is stated as a general rule that the *cestui que trust* may elect to claim the property, or claim an equity therein, for a restoration of the diverted fund.

It will be seen that, in repairing a wrong of the sort under discussion, the sole test of whether there has been an efficient election between two or more remedies, is whether a repugnancy exists between one resorted to and another attempted to be used. There is no repugnancy between different remedies, all of which are grounded upon the theory that the title to the property involved is in the defendant. One may easily go astray by failing to appreciate such test and the distinction between claiming the property, and the fund improperly vested therein, and claiming restoration of the fund as damages for the wrong and the right to security therefor upon the property, disclaiming title thereto, as owner. In the latter circumstances, the law affords all the remedies within the competency of the court to entertain which may be necessary to repair the wrong. There may be several actions and several forms of relief, but there can be but one satisfaction. *Russell v. McCall,* 141 N. Y. 437, 36 N. E. 498. The real subject of litigation here is the damage. The recovery sought was not the money incorporated into the securities, but the damage for breach of trust. Germane thereto was the claim to a lien upon the property improperly taken by the Trust Company, to secure compensation for such damage.

By misconceiving the attitude of respondent as claiming or dealing with the securities as owner, and seeking to recover the fund improperly invested therein, repugnancy between

the remedial rights asserted here would be quite apparent, and authorities, without number, could be cited to condemn it. Counsel for appellant found no difficulty in that regard, but the authorities relied on are beside the real case with which we have to deal.

It follows from the views expressed that no suggestion of counsel for appellant, other than those we have treated, need be discussed. The judgment is right and must be affirmed.

By the Court.—The judgment is affirmed.

Eschweiler, J., took no part.

Adams, Respondent, vs. Bucyrus Company, Appellant.

October 4—October 24, 1916.

Master and servant: Injury to employee: Unsafe working place: Evidence: Relevancy: Sufficiency: Special verdict: Instructions to jury: Damages.

1. In an action for personal injuries caused by the fall of a two-ton iron roller which had been standing for two days on its fifteen-inch rim on a sand floor in defendant's factory, evidence as to the jarring of the roller or of the floor by the operation of machinery was admissible as bearing upon the question of the security of the foundation on which the roller rested, even though the machinery or some of it was not being operated at the time of the accident.
2. The evidence in such case as to the condition of the floor or sand on which the roller stood is *held* to justify an inference that the fall of the roller was due to the insecurity of the uneven sand foundation on which it rested, and to warrant a finding by the jury that plaintiff's working place near the roller was not reasonably safe.
3. The refusal in such case to submit in the special verdict a separate question as to what caused the tipping over of the roller was not a prejudicial error.
4. It is not error to refuse requested instructions to the jury which are embodied in the charge given.

5. Although, upon the record before it on a former appeal, this court was of the opinion that an award exceeding $12,000 for plaintiff's injuries should not be sustained, yet, upon the evidence adduced at the second trial, showing more clearly the permanency of his disability and also the extent and intensity of his suffering and the certainty of its continuance through life, an award of $15,000 (reduced by the trial court from $17,300) is upheld.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries which plaintiff alleges he sustained while in defendant's employ. He claims that the injuries were caused by defendant's failure to furnish him a reasonably safe place to work.

The statement of the facts of the case on the former appeal as reported in 155 Wis. 70, 143 N. W. 1027, presents in clear and concise terms the relations of the parties, a description of defendant's premises where the accident happened, a description of the appliances and machinery in the immediate vicinity of plaintiff's working place, the location of the iron roller that fell on the plaintiff, the condition of the place where the roller stood and where plaintiff worked, and the nature and kind of sand foundation of the roller when it fell. In the light of that record it is not necessary to repeat the statement of the case here. The verdict on this trial is in substance and form the same as the verdict returned by the jury and incorporated in the report of the case on the former appeal. The jury on the second trial found in effect: (1) That the place where plaintiff was at work when injured was not reasonably safe considering the nature of his employment; (2) that the defendant knew in time to have prevented the injury to plaintiff that the place where he was at work was not reasonably safe; (3) that the defendant ought to have known in time to have prevented the injury to plaintiff that the place where he was at work was not reasonably safe; (4) that such failure to provide a reasonably safe place for the plaintiff to work was the proximate cause of his injury;

(5) that no want of ordinary care on the part of the plaintiff proximately contributed to produce his injury; (6) that the plaintiff in the exercise of ordinary care ought not to have known that the place in which he was working at the time of the injury was not reasonably safe; (7) that no negligence on the part of Emil Ranthum proximately produced plaintiff's injuries; and (8) that the sum of $17,300 will reasonably compensate plaintiff for the injuries he sustained.

The court overruled defendant's motions to change certain answers of the verdict, for judgment, and for a new trial, and entered judgment for the plaintiff in the sum of $15,000 with costs. From such judgment this appeal is taken.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Joseph B. Doe,* of counsel, and oral argument by *Mr. Doe* and *Mr. W. C. Quarles.*

For the respondent there was a brief by *Stover & Stover,* and oral argument by *John S. Stover* and *James H. Stover.*

Siebecker, J. It is contended that the admission of evidence pertaining to the jarring of the roller, or the floor at the place where the roller in question stood before it fell, by the operation of various kinds of machinery and appliances in defendant's manufacturing plant was clearly irrelevant and prejudicial under the issue raised by the pleadings and because it conclusively appeared that the machinery referred to as causing the jarring, except the north sand mill, was not in motion when the accident occurred. As indicated in the former decision, the question of whether or not there were vibrations of the floor where the roller stood, caused by the jar of machinery, was a material inquiry on the question of the security of the foundation on which the roller rested, and hence testimony on the subject was proper. The record does not disclose a state of facts which conclusively established that there was no such jarring or that vibrations caused thereby were not communicated to the floor on which the roller

rested. True, the evidence tends strongly to show that some of the machinery, which plaintiff claims produced such an effect, was not being operated at the time of the accident; this, however, cannot be said to make the evidence offered on the subject wholly incompetent, for it appears that the roller had stood where it was at the time it fell for about two days. This evidence had a bearing on the question whether or not the jarring affected the place where the roller stood, and if so whether it so affected this place as to make the roller insecure. It was considered on the former appeal that evidence offered by defendant and rejected by the court to show that any jarring from operating machinery could not have affected the security of the roller, should have been received as material on this issue. It was for the jury to determine whether or not the operating of the machinery referred to in the evidence produced such an effect, in the light of the statements of the witnesses who testified to having taken notice thereof, and it must be presumed that the jury gave this evidence only such consideration and weight as it reasonably bore on the question at issue between the parties. It must be held that the reception of the evidence on this question over defendant's objection was not prejudicial error.

It is asserted by appellant that the condition of the floor, or sand, on which the roller stood, as disclosed by the evidence, shows no grounds from which the jury could be permitted to infer that the place where the plaintiff worked was not reasonably safe. The evidence is in conflict as to the depth and quantity of sand at the place of the accident. In testifying to the depth of the sand under the roller the witnesses' estimate varied from about one inch to ten inches, and some of them testified that the surface was even, others that it sloped and was dumped in piles for use in the sand mill. A careful review of the evidentiary facts discloses that the evidence on this question on this trial is in substance and effect the same as it was on the first trial. The trial courts on

both trials, and this court on the former appeal, held that this evidence permitted of the inference that the roller stood on a sand foundation of a sloping and uneven nature and that such conditions justified the inference that the roller had an insecure foundation which caused it to move and fall. It is manifest that it did move and fall on the plaintiff, and these facts and circumstances warranted the jury in finding that this resulted from the insecurity of the roller due to the uneven sand foundation on which it rested. True, the evidence bearing on this question is sharply in conflict and the witnesses did not attempt to explain what caused the roller to topple over, but the course of its movement in the sand and its fall permits of the inference that its foundation was unstable and uneven, and that its weight and its position made the support on which it rested so insecure and unsafe as to cause it to lose its equilibrium and fall on the plaintiff.

The claim that the refusal of the court to submit the inquiry to the jury to find specially what caused the tipping over of the roller was prejudicial error, we think is not sustained. The finding by question 1 that the place was not reasonably safe necessarily embraced this inquiry, and it must be presumed that the jury found the roller tipped over because of the insecurity of the sand foundation. The rejection of the requested instructions to the effect that plaintiff had the burden of proof to show what caused the roller to tip as it did, and that the jury must be satisfied to a reasonable certainty of what caused it to tip to justify them in finding that the place where the plaintiff worked was not reasonably safe, was not error, because the instruction given by the court on this subject embodies what was thus requested. The court properly instructed the jury as to what constituted actual and constructive notice to defendant of the alleged unsafe condition of plaintiff's working place in submitting these issues in questions 2 and 3 of the special verdict and hence no error was committed in refusing to instruct as requested on these questions.

The evidence on the question of the plaintiff's assumption of the risk and of his contributory negligence is in substance the same as upon the first trial, and we find nothing in the record which shows that our conclusions as to these questions on the former appeal are incorrect, and must adhere to the view that the trial court correctly submitted these issues to the jury for determination upon the evidence.

On the former appeal this court expressed the opinion upon the record before it that an award of damages in excess of $12,000 should not be sustained. Upon this second trial the jury made an award of $17,300 and the trial court reduced it to $15,000. The trial court in ruling on this question declared that the jury "were of more than average intelligence and the court is of the opinion were not influenced by passion, prejudice, or sympathy in fixing the amount of damages sustained by the plaintiff." The court also held that in the light of the long time since the first trial and the evidence adduced, it appears beyond question that plaintiff is wholly incapacitated from pursuing his former vocation or doing labor of like kind and that he is so crippled that he will permanently require the use of crutches. The evidence now shows more conclusively than before the intensity and extent of his suffering and the certainty of its continuance through life. We are persuaded that this court should not overrule the judgment of the trial court on this question. We are of the opinion that the defendant had a fair trial and that the case was properly submitted to the jury and that the judgment appealed from must be affirmed.

By the Court.—The judgment appealed from is affirmed.

A. & S. Wilson Company, Appellant, vs. Matthews Brothers Manufacturing Company, Respondent.

October 4—October 24, 1916.

Corporations: Dividends: Rescission: Findings of fact: Evidence: Competency: Transaction with person since deceased: Appeal: Harmless error.

1. In an action by one corporation to recover from another certain dividends declared by the latter at a time when plaintiff owned all of its stock, findings of the court that, with plaintiff's consent, such dividends had been rescinded and the amount thereof transferred to the account of undivided earnings, to remain as an asset of the defendant, are *held* to be supported by the evidence.

[2. Whether testimony of defendant's president that plaintiff's president (since deceased) agreed to such transfer from the dividend account to undivided earnings account, was incompetent under sec. 4069, Stats., and if so whether it was properly objected to, not decided.]

3. Where a finding by the court is supported by competent evidence, the admission of incompetent evidence on the subject is not sufficient to work a reversal of a judgment based on such finding.

Appeal from a judgment of the circuit court for Milwaukee county: Oscar M. Fritz, Circuit Judge. *Affirmed.*

This action was brought by plaintiff, a Pennsylvania corporation, against the defendant, a Wisconsin corporation, to recover dividends claimed to have been declared. The action was tried by the court without a jury, and the court found that prior to November 6, 1903, plaintiff purchased all the shares of capital stock of the defendant and had the same transferred to it on defendant's books; that thereupon plaintiff procured the election of some of its officers and agents as directors and officers of defendant and through them controlled its business affairs; that the directors of defendant for 1904 and 1905 were Frank Abbott, A. F. Vogel, A. J. Schutz, Adam Wilson, and J. C. Wilson; that to these were added L. F. Crosby and J. C. Schreiner, and with these additions

those persons constituted the board of directors of the defendant until about June 20, 1911; that from 1904 to 1911 Frank Abbott was president, A. F. Vogel was treasurer, and A. J. Schutz secretary of said defendant company; that the directors of plaintiff for 1904 were W. L. Abbott, John Schreiner, J. C. Schreiner, A. J. Schutz, Adam Wilson, and J. C. Wilson, and in 1905 the directors of plaintiff were the same persons with the exception of the substitution of W. P. Clyde for John Schreiner; that in 1906 Frank Abbott and A. F. Vogel were added, and said board of directors then continued the same in 1907 and 1908 except in the latter year John Deuar took the place of Frank Abbott; that in 1909 and 1910 the board consisted of Adam Wilson, J. C. Wilson, John Schreiner, J. C. Schreiner, A. J. Schutz, W. L. Abbott, John Deuar, A. F. Vogel, and Charles McKnight; and that during all of the time from 1904 to 1911 Adam Wilson was president and A. J. Schutz treasurer of plaintiff; that on November 6, 1903, defendant declared a $10,000 dividend out of its net earnings for the year 1903, which was credited upon its books to the account of plaintiff; that defendant on August 16, 1904, paid $5,000 to plaintiff on account of said dividend, and on February 4, 1905, $2,645.73, leaving a balance owing plaintiff on said dividend account of $2,354.27; that on November 23, 1904, defendant declared a dividend of $39,645.73 which was credited on its books to the account of plaintiff; that prior to November 18, 1905, defendant was unable to obtain loans without indorsement by defendant's president, Frank Abbott, and he refused to indorse unless credit to plaintiff on account of dividends declared and remaining unpaid were rescinded as a liability of defendant; that thereupon a resolution was adopted with the approval of the agents and officers of plaintiff as follows: "The books were examined and approved showing earnings from November 1, 1904, to November 1, 1905, of $27,618.42. On motion of A. F. Vogel, seconded by Adam Wilson, this amount

($27,618.42), together with the dividend account of $42,000, were ordered to be transferred to an account to be titled 'Undivided Earnings;' " that pursuant to said resolution said credit of $42,000 was rescinded and transferred on the books of defendant from the account of the plaintiff as a credit thereon to a new account which was entitled "Undivided Earnings," and said amount was thereafter considered as undivided earnings of defendant; that at the time of said rescission and transfer Adam Wilson and A. J. Schutz, individually and as president and treasurer of plaintiff, had knowledge that said credit of $42,000 had been so rescinded and transferred; that thereafter annually statements of defendant's accounts, which included the amount of said credit in the "Undivided Earnings" account and omitted to show any credit to the plaintiff to the extent of said item of $42,000, were submitted at annual meetings of the stockholders of the defendant and were approved by plaintiff as sole stockholder of defendant, and that neither the plaintiff nor its officers or stockholders at any time objected to or disapproved of the manner in which said credit of $42,000 had been rescinded and discharged upon the books of the company; that about November 22, 1906, the net earnings of defendant during the fiscal year 1906, amounting to $10,986.87, were transferred to the "Undivided Earnings" account; that about November 21, 1907, the net earnings during the fiscal year 1907, amounting to $34,602.34, were transferred upon the books of the defendant to "Profit and Loss" account and then transferred to the "Undivided Earnings" account; that about November 18, 1908, the net earnings of defendant during the fiscal year 1908, amounting to $18,472.55, were transferred upon the books of defendant to "Profit and Loss" account and from that account to "Undivided Earnings" account; that on or about November 17, 1909, the net earnings of said defendant during the fiscal year 1909, amounting to $8,882.27, were transferred to "Profit and Loss" account and from that

account to "Undivided Earnings" account upon the books of defendant; that about May 31, 1911, the net earnings of said defendant during the fiscal year 1910, amounting to $7,725.34, were transferred upon the books of defendant to the "Profit and Loss" account and from that account to "Undivided Earnings" account; that from May 31, 1911, to June 30, 1911, there appeared upon the defendant's books in said "Undivided Earnings" account a credit balance amounting to $83,735.62, no part of which has ever been paid to plaintiff; that at all times after November 18, 1905, plaintiff and defendant treated the $42,000 credit which had been rescinded and transferred to "Undivided Earnings" account, together with the earnings during 1906, 1907, 1908, and 1909, which had been transferred to "Undivided Earnings" account, as undivided earnings or net profits of defendant applicable to the payment of dividends; that the dividends declared were as follows: November 20, 1907, $37,500, which was a dividend of thirty-seven and one-half per cent. on the capital stock of defendant; November 18, 1908, $19,052.25; November 19, 1909, $10,000; that except for said dividends declared November 20, 1907, November 18, 1908, and November 19, 1909, no dividends were declared by defendant after the transfer of the credit of $42,000 until July 6, 1911; that the dividend of November 20, 1907, was discharged by paying indebtedness due from plaintiff to defendant and paying the balance to the plaintiff; that the dividend of November 18, 1908, was discharged by defendant by four payments of $2,410.62 each to plaintiff as an advancement on account and in anticipation of a dividend to be declared and by giving plaintiff credit for balance of dividend remaining unpaid; that the dividend of November 19, 1909, was fully discharged by making four payments of $2,410.62 each as an advancement on account and in anticipation of dividend to be declared for the year 1909 and by giving plaintiff credit for balance of dividend, $375.52; that no payment had been made

to plaintiff within six years prior to the commencement of this action on account of the credit balance of $42,000; that on July 1, 1910, a receiver of the assets of the plaintiff was appointed in the Pennsylvania court; that on June 20, 1911, said receiver sold all shares of the capital stock of the defendant, together with other assets of plaintiff, to W. L. Abbott, John Schreiner, and Charles McKnight, who purchased said stock pursuant to an arrangement with and for the benefit of Frank Abbott; that said receiver intended to sell and the purchasers intended to buy said shares of the capital stock on the basis of assets and liabilities of the defendant as shown by statements and audits and unincumbered by any obligation of defendant to plaintiff; that upon consummation of said sale of capital stock the mutual accounts existing between plaintiff and defendant were stated by and between the receiver and defendant, and the sum of $4,667.68 found to be owing by plaintiff to defendant, and said receiver on June 30, 1911, paid said sum to defendant in full settlement and discharge of all accounts and demands between plaintiff and defendant; that the sale by said receiver was authorized and approved by the court, and that it was within the scope of the authority of the receiver to state the accounts existing between the plaintiff and defendant and to pay said amount found due to defendant in full settlement of all demands existing between the parties; that the receiver was discharged May 17, 1912, and all assets which formerly belonged to the plaintiff remaining in his hands at the time of discharge were transferred to plaintiff; that on June 30, 1911, the defendant transferred the item of $83,735, which was balance on that day in "Undivided Earnings" account, to the "Surplus" account on the books, and also transferred an item of $2,000 from its "Profit and Loss" account, for an amount which it had received on May 10, 1910, on account of a contract which had been completed in the year 1907, to its "Surplus" account; that on July 6, 1911, defendant increased its capital stock $50,000

and issued shares to its stockholders to that extent, which shares were paid for by applying $50,000 of the accumulated balance in said "Surplus" account in payment thereof.

The court concluded that to the extent of the sum of $42,000, dividends which had been declared by defendant and which had been payable to plaintiff prior to November 18, 1905, were rescinded on said date, and plaintiff was estopped to deny that said dividends had been rescinded with its consent and that all rights to payment thereof to plaintiff had been waived and discharged; that the cause of action to recover said sum of $42,000 on account of dividends declared and payable to plaintiff prior to November 18, 1905, was at the time of the commencement of this action barred by the statute of limitations; that the defendant is in no manner whatsoever indebted to plaintiff, and is entitled to judgment dismissing plaintiff's complaint with costs and disbursements.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and oral argument by *J. V. Quarles.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Douglass Van Dyke.*

KERWIN, J. The findings of fact give a complete history of the case and basis of the recovery below.

The real controversy on the trial was whether certain alleged dividends declared had been rescinded and the amount thereof returned to the defendant as undivided earnings. The court found in favor of the defendant, and the findings appear to be well sustained by the evidence, and support the judgment. No useful purpose would be served by a discussion of the evidence.

1. Error is assigned on the admission of evidence. In reply to a question asked Mr. Abbott he was required to answer under objection that Mr. Wilson, deceased, agreed to

transfer from dividend account to undivided earnings account and allow the dividend transferred to remain as an asset of the defendant. It is insisted by appellant that this evidence was not admissible under sec. 4069, Stats. On the part of respondent it is argued that the evidence was never properly objected to, that it was competent, and, if not, it was not prejudicial. Whether the evidence was competent or properly objected to we do not decide. There was other competent evidence to support the finding, therefore the evidence complained of, even if incompetent and properly objected to, cannot be successfully urged as sufficient to disturb the judgment. *Stark v. Duhring,* 140 Wis. 521, 122 N. W. 1131; *Currie v. Michie,* 123 Wis. 120, 101 N. W. 370; *Hannah v. Knuth,* 161 Wis. 467, 154 N. W. 985.

2. It is also argued by the respondent that even if the $42,000 remained a dividend and was not rescinded and turned into the surplus of the corporation as assets, still such claim was barred by the statute of limitations. We need not pass upon that proposition because, as before observed, the findings are supported by the evidence and establish that the $42,000 dividend declared was canceled and the amount thereof thereafter regarded by all parties interested as assets of the defendant.

Some other questions are raised on this appeal by counsel on both sides, but it is unnecessary to treat them.

We find no prejudicial error in the record and are satisfied that the judgment below is right and should be affirmed.

By the Court.—Judgment affirmed.

MORGENTHALER and another, Respondents, vs. SOMERS, imp., Appellant.

October 4—October 24, 1916.

Accord and satisfaction: Promise and performance: Evidence.

1. Where, a claim based on contract being controverted, the parties agreed that upon payment of a certain sum in cash or upon the delivery of a bankable note for such sum by defendant the dispute should be settled, but thereafter the defendant refused to carry out such agreement, there was no accord and satisfaction and the settlement agreement was no defense to an action on the original claim.
2. Had the settlement agreement been such that plaintiff accepted the mere promise of defendant to pay a certain sum in full accord and satisfaction, then only an action on that promise could be maintained.
3. It was not error in such case to admit evidence of conversations between plaintiff and an agent who had acted for defendant in the transaction, relating either to what the settlement agreement was or to the question whether it had been executed.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action to recover the purchase price of $1,702.83 of certain crockery sold the defendant, together with the cost of storage, insurance, and interest. The part of the answer material to the issues litigated is as follows:

"That on the 27th of July, 1914, plaintiffs made claims against the defendant *Somers* and alleged in substance the facts alleged in the complaint as entitling them to money from the defendant as demanded in the complaint, and that the defendant denied justice of plaintiffs' claim and objected thereto. That thereupon it was agreed between defendant and plaintiffs that the controversy should be settled and compromised upon the terms that plaintiffs should retain possession and title to the merchandise described in the complaint and defendant should pay plaintiffs one third of the amount of the plaintiffs' demand for merchandise contained in the plaintiffs' complaint and the sum demanded by the plaintiffs for

storage and insurance upon the goods. That this agreement still remains in force and effect and that the defendant has been at all times and still is ready and willing to pay the amount stipulated by the contract of compromise and settlement."

One H. B. Harvey acted as agent for the defendant *Somers* in the transaction.

The jury found (1) that *E. W. Morgenthaler* and H. B. Harvey did on or about July 27, 1914, enter into an agreement by which, upon the payment of the sum of about $600 in cash or upon the delivery of a bankable note for a like amount signed by *Charles W. Somers,* the parties to this case would settle the dispute between them; (2) that the defendant *Somers* through his agent, Mr. H. B. Harvey, refused to carry out the agreement of settlement which was made by *Mr. Morgenthaler* and Mr. Harvey on the 27th of July, 1914.

There being no dispute as to the correctness of the original invoice, storage, interest, and insurance, judgment on the verdict for $1,901.23 and costs was entered in favor of the plaintiffs and against the defendant *Somers.* As to the other defendants the complaint was dismissed with costs. *Somers* appealed.

For the appellant there was a brief by *Quarles, Spence & Quarles,* and oral argument by *Louis B. Montfort.*

For the respondents there was a brief by *Doerfler, Green & Bender,* and oral argument by *Christian Doerfler.*

Vinje, J. In addition to the questions set out in the statement of facts the special verdict contained this unanswered question: "Did H. B. Harvey and *E. W. Morgenthaler,* on or about July 27, 1914, agree that, upon the promise that *Somers* would pay $600 in cash, the plaintiffs would settle their cause of action?" It will thus be seen that the issue as to whether the agreement was to accept the *promise* of *Somers* to pay $600, or to accept that amount in cash or a bankable

note signed by *Somers,* was squarely put to the jury and that they found, as contended by plaintiff, that the agreement was that $600 in cash should be paid or *Somers's* bankable note for a like amount should be given in lieu of the original contract. Such finding is sustained by the evidence. That being so, the original contract remained in force till the $600 was paid or the bankable note tendered. There must be both accord and satisfaction. 1 Corp. Jur. 567. Bouvier defines accord and satisfaction as "An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account." 1 Bouv. Law Dict. (Rawle's 3d Rev.) 103. In this case the jury found the substituted agreement was unperformed—hence it constituted no satisfaction and no bar to an action founded upon the original contract. Had the jury found, as contended by defendant *Somers,* that plaintiffs accepted the mere *promise* of *Somers* to pay $600 in full accord and satisfaction, then only an action upon such substituted agreement could be maintained.

Error is assigned because the court admitted conversations between plaintiff and Harvey subsequent to that of July 27, 1914. Harvey dealt with *Somers* at Cleveland and such conversations related either to Harvey's refusal to pay or give a note signed by *Somers* or to other replies which Harvey received from *Somers* at Cleveland. We perceive no error in the reception of such evidence, as it related either to what such alleged compromise agreement was or whether or not it had been executed.

By the Court.—Judgment affirmed.

LEUTERMANN, Receiver, Respondent, vs. ASCHERMANN and others, Appellants.

October 4—October 24, 1916.

Fraudulent conveyances: Purchase of exempt property: Intent: Notice.

1. **A debtor may, in good faith, purchase a homestead with nonexempt money or property.**
2. **Even if such a purchase be made with the intention of defeating creditors, the transaction cannot, under sec. 2324, Stats., be set aside unless it be shown that the other party thereto had notice of or participated in such fraudulent intent.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

The case is this: A receiver appointed in supplementary proceedings brings the action to set aside, because fraudulent as to creditors, a transfer of a $5,000 legacy made by the judgment debtor to one of the defendants in consideration of a conveyance of certain real estate which the debtor immediately made his homestead. There was no proof that the assignee of the legacy had any knowledge that the judgment debtor was indebted, and no evidence that she participated in any way in the fraudulent intent of the debtor, if in fact he had one. The trial court set aside the transfer on the ground apparently that, because the conversion of nonexempt property into exempt property must hinder creditors in the collection of their debts, the transfer was necessarily fraudulent, regardless of the intent of the other party to the transaction. The defendants appeal.

For the appellants there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *W. L. Gold,* of counsel, and oral argument by *Mr. F. L. McNamara* and *Mr. Gold.*

F. P. Hopkins, for the respondent.

WINSLOW, C. J. The judgment must be reversed because: *First,* a man may, in good faith, purchase a homestead

and use nonexempt property or money for that purpose even although he be indebted at the time. *Scofield v. Hopkins,* 61 Wis. 370, 21 N. W. 259; *Scott v. Holman,* 117 Wis. 206, 94 N. W. 30. *Second,* even if he makes the purchase with the intention of defeating his creditors, the transaction cannot be set aside unless it is shown that the other party had notice of or participated in the fraudulent intent of the debtor. Sec. 2324, Stats.

The case of *Comstock v. Bechtel,* 63 Wis. 656, 24 N. W. 465, when properly read does not lay down any contrary doctrine.

By the Court.—Judgment reversed, and action remanded with directions to dismiss the complaint.

PERELES, Executrix, Respondent, vs. CHRISTENSEN, Appellant.

October 5—October 24, 1916.

Action: Dismissal for delay: Abatement and revival: Death of party: Discretion.

1. Sec. 2811*a*, Stats., does not absolutely bar proceedings in actions not brought to trial within five years, but is permissive and is to be enforced within the sound discretion of the court.
2. An application to revive an action under secs. 2803, 2810, Stats., is a special proceeding and is addressed to the sound discretion of the court; and the applicant must show diligence, good faith, and that his laches, if any, will not operate to the prejudice of adverse parties or subject them to injury or inequity.
3. The revival of an action which had not been brought to trial within five years after its commencement is *held* in this case not an abuse of discretion, the delay having been occasioned mainly by sickness and death, first of the plaintiff, and afterwards of one of his executors, and by the financial irresponsibility of defendant until a short time before the proceeding for revival was begun; and it appearing that defendant, who had counterclaimed for a sum in excess of plaintiff's demand, had acquiesced in the delay and had not been prejudiced in the loss of evidence or otherwise.

Appeal from an order of the circuit court for Milwaukee county: W. J. Turner, Circuit Judge. *Affirmed.*

This is an action to recover the sum of $5,693.53, the unpaid balance due on a promissory note dated June 3, 1907, given by Edward M. Maxwell to the defendant, which note the defendant, for value received, indorsed and delivered to James M. Pereles, waiving, in writing on the note, presentment and demand of payment and notice of nonpayment.

The plaintiff's testator, James M. Pereles, commenced this action on April 12, 1910. The amended answer alleges a release of the defendant by the plaintiff. This release is alleged to have been verbal and made by telephone. Defendant also interposed a counterclaim alleging that James M. Pereles, deceased, agreed to indorse notes of defendant in the sum of $28,000 as an accommodation indorser and agreed to pay the notes when due, but that defendant had to pay the notes himself, and in order to meet these obligations was forced to sell certain real estate for $25,000 which was subsequently sold for $75,000, thereby damaging defendant in the sum of $50,000. A reply to the counterclaim was served on August 5, 1910.

The original plaintiff, James M. Pereles, died on December 10, 1910, and no proceeding in this action was had or taken by either party thereto until the present motion to revive was made by the plaintiff's surviving executrix on March 3, 1916. The petition for revival alleges the death of plaintiff, James M. Pereles, and that Thomas J. Pereles and petitioner were named as his executors and letters testamentary granted to them January 3, 1911. Thomas J. Pereles died June 8, 1913, and the petitioner is the sole surviving executrix of the will. The petition also sets forth as reasons for permitting the action to lie dormant the death of James M. Pereles, the long-continued illness of petitioner's co-executor and his death in 1913, and the fact that defendant has been financially irresponsible until very recently.

The circuit court ordered that the action be revived in the name of *Jennie W. Pereles,* executrix, as plaintiff in the place of James M. Pereles, deceased, and that the supplemental complaint attached to the moving papers and filed shall stand as such supplemental complaint and a copy of the same be served on defendant's attorneys within twenty days. From such order this appeal is taken.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. E. Monroe.*

For the respondent there was a brief by *Pereles, Strouse & Carter,* and oral argument by *Alex. L. Strouse.*

SIEBECKER, J. There is no dispute on the propositions that this cause of action on the note survives the death of the deceased party; that if proper the action may be revived under the provisions of secs. 2803 and 2810, Stats.; and that such an order is appealable. It is suggested that the order of revival is erroneous because the application was not made until more than five years had expired from the time of the commencement of the action, and hence the limitations of sec. 2811*a,* Stats., apply and operate as a bar to the proceeding. This provision in the statutes is not intended to operate as an absolute bar to proceed in actions after the expiration of five years from the commencement thereof. The statute is clearly permissive in its terms and is to be enforced within the sound discretion of the courts. It has been so interpreted and applied by the courts. *Hine v. Grant,* 119 Wis. 332, 96 N. W. 796; *Smith v. Carter,* 141 Wis. 181, 122 N. W. 1035. The proceeding to revive is taken under the provisions of sec. 2803, providing:

"In case of the death or other disability of a party, if the cause of action survives or continues, the court, on motion, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow or compel the action to be continued by or against his representatives or successor in interest."

The proceeding is a special one, and the right to revive is favored in the law when the interest of justice is promoted thereby. The application for revival is therefore one addressed to the sound discretion of the court. *Cavanaugh v. Scott,* 84 Wis. 93, 54 N. W. 328; *Fleming v. Ellison,* 124 Wis. 36, 102 N. W. 398; *Voss v. Stoll,* 141 Wis. 267, 124 N. W. 89; *R. G. Uhlmann F. Co. v. Gates,* 155 Wis. 385, 144 N. W. 991. It is incumbent on the party seeking relief under this statute to show diligence, good faith, and that his laches, if any, will not operate to the prejudice of the adverse party by having induced a change of condition or relation of the property or parties to the matters involved, or have occasioned the loss of means of presenting the rights of the parties to the court, or otherwise have subjected them to injury and inequity. An examination of the facts and circumstances disclosed by the foregoing statement shows that the delay of the trial of this action was occasioned in the main through the sickness and consequent death of James M. and Thomas J. Pereles and by the fact that the defendant was financially irresponsible up to a time shortly before this proceeding for revival was begun. These facts and circumstances show a reasonably good excuse why the prosecution of the action was delayed. The record also discloses that defendant alleges a counterclaim far in excess of the plaintiff's demand, which it is averred could be established only by the oral evidence of defendant and James M. Pereles, deceased, and that his death will deprive defendant of such evidence. It appears that the case could not have been brought to trial, after issue joined in August, 1910, prior to the time James M. Pereles died in December, 1910, hence defendant is not prejudiced in the loss of such evidence by the delay of the trial of the case. The facts and circumstances also show that the defendant has not otherwise suffered any inequity by reason of the delay of the trial of the action. It also appears that the defendant failed to bring the case to trial and thus

vindicate his rights to the affirmative relief he claims to be entitled to under his counterclaim in the action. He evidently acquiesced in the delay and hence occupies no favorable position to urge laches against the adverse party. The record fully justified the ruling of the trial court and no abuse of its discretion is shown.

By the Court.—The order appealed from is affirmed.

City of Milwaukee, Appellant, vs. Locher & Schefrin Company, Respondent.

October 5—October 24, 1916.

Municipal corporations: Regulation of weights and measures: Ordinances: Violation.

1. **The purpose of sec. 1428, Milwaukee Code of 1914,—prohibiting all use of false weights and measures and providing a penalty for each violation,—is to require the use of weights and measures which themselves correctly express their value so that recourse need be had only to such weights and measures in order to determine the correct quantity weighed or measured.**
2. **The use, by a buyer of metal, of an old weight marked 100 pounds on a scale where it was the equivalent of a 200-pound weight was a violation of said sec. 1428, and proof of a single instance of such use was sufficient to warrant a conviction, even though it was shown that in that instance the weight was treated as a 200-pound weight and there was no fraud or deception.**

Eschweiler, J., dissents.

Appeal from a judgment of the municipal court of Milwaukee county: A. C. Backus, Judge. *Reversed.*

Action to enforce a penalty for a violation of sec. 1428 of the Ordinances of the City of Milwaukee (Milwaukee Code of 1914), which provides that

"Any person, who, by himself or by his servant or agent, or as the servant or agent of another, shall use or retain in his possession any false weight or measure or any weight or

measure or weighing or measuring device to be used in the buying or selling of any commodity or thing which has not been sealed by the sealer of weights and measures according to the provisions of this chapter; or any person who, by himself or by his servant or agent, or as the servant or agent of another, shall sell or offer or expose for sale, or keep for the purpose of sale, less than the quantity he represents; or who shall in the purchase or offer to purchase of any thing represent such a thing to be of less than its true quantity; or who, by himself or by his servant or agent or as the servant or agent of another, shall use any false weight or measure in buying or selling any commodity or thing, or shall sell or offer or expose for sale, or keep for the purpose of sale, any commodity in a manner contrary to law or the provisions of this chapter, or any person, who, by himself or by his servant or agent, or as the servant or agent of another, shall sell or offer to sell or have in his possession for the purpose of selling, any device or machine to be used or calculated to falsify any weight or measure, shall upon a conviction forfeit to the city of *Milwaukee* a penalty of not less than twenty-five dollars, nor more than one hundred dollars."

The evidence showed that the defendant, through a servant, bought a load of lead from one Schatz; that in weighing it a weight from an old abandoned scale, marked 100 pounds, was used; that on the scale upon which the lead was weighed such weight was the equivalent of a 200-pound weight, and Schatz was so told and consented to its use. In weighing the lead the weight was treated as a 200-pound weight and Schatz received payment in full for the true weight of the lead which the load contained. The trial court concluded that the defendant had not violated the ordinance in question, and from a judgment entered accordingly the plaintiff appealed.

For the appellant there were briefs by *Clifton Williams*, city attorney, and *Benjamin W. Reynolds*, assistant city attorney, and oral argument by *Mr. Reynolds*.

For the respondent there was a brief by *Churchill, Bennett & Churchill*, and oral argument by *W. H. Churchill*.

VINJE, J. It is obvious that in the instant case no damage resulted to the seller by reason of the use of the weight in question because the buyer correctly disclosed its value on the scale used. But the purpose of the ordinance was to require the use of weights and measures which themselves correctly express their value so that neither party shall be compelled to rely upon the representations of the other. The intention was to require true weights and measures to be used so that recourse need be had to such weights and measures only in order to determine the correct quantity weighed or measured. This intention is disclosed by the language used; by the evident object sought to be reached; by the fact that other parts of the ordinance penalize the buyer who represents the quantity less than it is; and by that part thereof forbidding the use of weights or measures not sealed by the sealer of weights and measures. The ordinance requires not only that true weights and measures be used, but that they shall have been tested and sealed by the designated authority, thus enabling any party to determine by an inspection of the weight or measure that it has been duly tested and sealed, and is correct. Manifestly the weight in question had not been tested and sealed as a true weight on the scale used. It spoke falsely. It said, I represent 100 pounds, when in fact it represented 200 pounds. The ordinance requires the language of the weight to be truthful, to the end that reliance need not be placed upon human representations, which may be affected more or less by self-interest. The only way to reasonably safeguard the interests of buyers and sellers of commodities, as to weighing and measuring, is to require the use of instrumentalities that are in fact what they purport to be; that speak for themselves, and speak the truth. Any departure from such scheme opens the door to misrepresentations and fraud, the very door which the ordinance declares shall be closed.

The argument is made that defendant is not guilty because it is not shown that it was in the habit of using the weight as it did; that to constitute the using of false weights there must be shown more than one isolated instance of such use. The argument is not well taken. The ordinance unmistakably makes each false use a violation thereof. It makes no provision for occasional lapses. It does not require the city to establish customary delinquency before the penalty can attach. The ordinance forbids all use of false weights and measures and provides a penalty for each violation thereof.

By the Court.—Judgment reversed, and cause remanded with directions to enter a judgment of guilty, and for further proceedings according to law.

Eschweiler, J. I must dissent from the conclusion of the court in this case. The plain purpose and only reason for the existence of sec. 1428 of the City Ordinances of Milwaukee is the proper one of preventing fraud in buying and selling of commodities either by false representations as to quantities or by the use of weights which deceive. It should be construed when applied to any particular set of facts in the light of its purpose. *State v. Hall,* 141 Wis. 30, 34, 123 N. W. 251; *Weirich v. State,* 140 Wis. 98, 101, 121 N. W. 652; *State v. Boliski,* 156 Wis. 78, 81, 145 N. W. 368.

The construction put upon this ordinance by the decision in this case places one who has been found to have worked no wrong to any one, who explained to the person whose commodities were being weighed the real facts, so that as to such person the weight placed in the scale was not a false one, on the same footing with one who uses some trick, device, or artifice to deceive to his own benefit and another's harm.

I think the ordinance should be construed to hold persons liable to the penalty therein provided who either, first, deceive by untrue representations as to quantity; or secondly,

actually do defraud some person by the use of improper weights; or thirdly, who continue to keep and use in the buying and selling of commodities weights that would permit of such deceiving of another; and that to make a conviction possible under the third of these constructions there should be evidence of such a use as would carry with it the proper inference that it was a part of a determination to take advantage of the fraud or wrong when opportunity offered.

It has been held in *Comm. v. Patterson,* 138 Mass. 498, that the word "use" has included in it some element of permanency; in *State v. Stanley,* 84 Me. 555, 24 Atl. 983, 984, that a single sale of liquor does not constitute a "use" of a building for the sale of intoxicating liquors; and in a number of cases, including *Pacific Mut. L. Ins. Co. v. Terry,* 37 Tex. Civ. App. 486, 84 S. W. 656; *Grand Lodge A. O. U. W. v. Belcham,* 145 Ill. 308, 33 N. E. 886; *Chambers v. Northwestern Mut. L. Ins. Co.* 64 Minn. 495, 67 N. W. 367; and 25 Cyc. 809, that an occasional drink of intoxicants is not a "use" of liquors such as to negative a statement in an application for life insurance that the applicant does not use intoxicating liquors.

It is contended that the construction given by the court in this decision is necessary, otherwise the city would be put to hardship in proving that the use of false weights was a repeated or continuous use. Such a situation is not in this particular case, for the testimony shows that, after using the two weights of 1,000 and 500 pounds respectively, a 200-pound weight was needed, and, not being then found, that this old weight, which, after it had been discarded with an old scale, on which old scale it was a true weight, had been used as a paper weight, was used to complete that particular weighing with the knowledge and at least tacit consent of the only person interested, thus clearly showing that in this particular instance before us this was an isolated, sporadic use, and not such a use as would come within the reasonable con-

struction of the ordinance. The record in this case, therefore, expressly negatives the contention made.

I do not think a defendant in a *quasi*-criminal prosecution, such as cases of this kind have been designated (*State v. Hamley,* 137 Wis. 458, 460, 119 N. W. 114; *Milwaukee v. Ruplinger,* 155 Wis. 391, 394, 145 N. W. 42), should be used for what might seem demonstrating purposes, or that respect for such ordinances will be heightened by the hardship imposed on defendant in this case. I fear that the construction placed upon this ordinance under the facts in this case by the majority opinion might have applied to it the suggestion found in *Rider v. Ashland Co.* 87 Wis. 160, 164, 58 N. W. 236: "Where the intention is clear, too minute a stress should not be laid on the strict and precise signification of words. *Qui hæret in litera hæret in cortice.*"

It appears to me that under a reasonable and fair construction given the ordinance in question, under the facts in this case, the judgment of the court below was right and should have been affirmed.

CITY OF MILWAUKEE, Respondent, vs. RAULF, Appellant.

October 5—October 24, 1916.

Constitutional law: Labor regulations: Limiting hours of employment on public works: Powers of state and of municipal corporations: Police power: Ordinances: Penalties for violation: Validity: Reasonableness: Construction: Judicial questions: Public policy.

1. The state has power to limit (as by sec. 1729*m*, Stats., it has limited) the hours of labor on public buildings or works contracted for by the state or any officer or agent thereof.
2. Such limitation of the hours of labor is not an exercise of the police power, but of a power incidental to and inherent in the right of the state to contract for public works and to specify the conditions under which labor upon public works shall be performed.

3. Although the power to prescribe the conditions under which public works shall be carried on by cities is primarily in the state, yet, subject to the constitutional limitation as to indebtedness and certain prescribed rules of procedure, the whole matter of providing public works in cities has been delegated to the cities themselves; and, as an incident to its power in that regard, a city has the same inherent power that the state has to prescribe the conditions upon which the work shall be done, including the power to fix the hours during which those employed shall be permitted to labor.
4. The fact that in its proprietary capacity a city has, as a part of its contractual powers, the incidental authority to limit the hours of labor on public works, does not prevent it in its governmental capacity from enforcing the limitation by ordinance.
5. Under the general welfare clause in its charter the city of Milwaukee had power to enact an ordinance limiting to eight hours per day the employment, by the city or by any contractor, of laborers and mechanics upon any of the public works of the city, and to impose a penalty for violation of such ordinance; and upon the adoption of such ordinance it had the force and effect of a law and became a part of every contract relating to such public works.
[6. Whether, in the absence of authority expressly conferred in the charter, such an ordinance could lawfully provide that its violation should be punished by imprisonment, is not decided.]
7. Such an ordinance limiting the hours of employment on public works does not conflict with a provision in the city charter requiring all contracts for such works to be let to the lowest bidder.
8. An ordinance limiting to eight hours per day the employment of laborers and mechanics upon any of the public works of the city is *held* in this case not unreasonable, although no provision is made therein for overtime except "in case of extraordinary emergency," and although the cost of the public works will be greatly increased thereby, as compared with the cost of doing the work under a ten-hour schedule.
9. The intention of such ordinance is that work theretofore done usually, ordinarily, and customarily during the nine- or ten-hour period should be done by persons employed upon public works for eight hours instead of nine or ten hours.
10. The courts, in passing upon the validity of a law, have nothing to do with mere questions of public policy, so long as the law is within the field of legislative power and discretion.

APPEAL from a judgment of the municipal court of Milwaukee county: J. C. LUDWIG, Acting Judge. *Affirmed.*

The appeal is from a judgment finding the defendant guilty of violating an ordinance of the city of *Milwaukee* prohibiting the employment of labor on public works contracts more than eight hours a day.

The defendant was arrested upon a warrant issued from the district court of Milwaukee county upon a sworn complaint charging him with the violation of the ordinance in question. Upon his arrest he appeared, pleaded not guilty, and by way of defense alleged that the ordinance in question was void. He was found guilty. Judgment of the district court was entered, and defendant appealed to the municipal court. The case was tried *de novo* in the municipal court upon the original complaint and an amended answer. The complaint was as follows:

"Dan McCargue, being duly sworn, on oath complains to the district court of the county of Milwaukee, that *Con Raulf, Jr.,* on the 16th day of July, 1914, at the city of *Milwaukee,* in said county of Milwaukee, did violate section 562 of an ordinance of said city entitled 'An ordinance to revise and codify the general ordinances of the city of Milwaukee,' passed May 25, A. D. 1914, in this, that the said *Con Raulf, Jr.,* being then and there a contractor engaged and employed upon certain public works of this city by contract with said city, to wit, concrete work at the mouth of the tunnel emptying into Kinnickinnic river at Cleveland avenue and First avenue in said city, and said defendant having in his employ, control and direction laborers and mechanics working on said public works, said defendant did then and there permit and require said laborers and mechanics to work more than eight hours on a certain calendar day, namely, the 16th day of July, A. D. 1914; that the said work performed by said laborers and mechanics for the defendant on said day was not work of extraordinary emergency as specified in said section of said ordinance; that the defendant did thereby become subject to pay the penalty provided for in said ordinance; that said ordinance was then and is now in force, and prays that the said *Con Raulf, Jr.,* may be arrested and held to answer to the said city of *Milwaukee* therefor."

The amended answer, omitting the formal parts, was as follows:

"For a further defense defendant alleges that a certain ordinance of the city of *Milwaukee,* entitled 'An ordinance relating to the limitations of daily service of laborers and mechanics employed upon the public works of the city of *Milwaukee,*' passed April 24, 1911, and particularly section 1 thereof, as re-enacted as section 562 of an ordinance of said city entitled 'An ordinance to revise and codify the general ordinances of the city of *Milwaukee,*' passed May 25, 1914, which defendant is alleged to have violated, is unconstitutional and void.

"For a further defense defendant alleges that said ordinance is *ultra vires,* and void because the terms thereof and the ordinary operation and effect of said ordinance is to conflict with the terms and provisions of the charter of the city of *Milwaukee,* and particularly with section 10 of chapter 5 of said charter, otherwise known as chapter 144, Laws 1875, as amended by chapter 324, Laws 1882, and further amended by chapter 388, Laws 1889.

"For a further defense the defendant alleges that said ordinance is void because the same is unreasonable, in that it prevents the doing of many kinds of city contract work, but particularly the kind of city contract work that the defendant was engaged upon at the time of his alleged violation of said ordinance, as herein charged, and renders the doing of such work impracticable and makes the cost thereof exorbitant and in that it unlawfully interferes with the right to contract upon the part of persons affected by said ordinance."

The case was tried by the court without a jury, and the trial resulted in the conviction and sentence of the defendant as follows:

"Ordered that *Con Raulf, Jr.,* the defendant herein, be and hereby is adjudged guilty of the violation of said section of said ordinance, that said defendant pay a penalty of $15, together with the costs of this suit taxed and allowed at $32.45, or in default thereof be committed to the house of correction for Milwaukee county, Wisconsin, for a term not to exceed thirty days."

From the judgment of the municipal court of Milwaukee county the defendant appeals.

Lawrence A. Olwell, of counsel, and *James T. Drought,* attorney, for the appellant.

For the respondent there was a brief by *Clifton Williams,* city attorney, and *Charles W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

Rosenberry, J. The defendant was properly convicted and sentenced if the ordinance relating to "hours of labor upon public works," being sec. 562 of the general ordinances of the city of *Milwaukee,* is a valid ordinance. The defendant claims that it is not valid for four reasons, stated as follows:

"1. The ordinance is not authorized by the charter as an exercise of police power.

"(a) There is no delegation of such authority.

"(b) As a police power regulation, classification is improper.

"(c) Would such a delegation of police power be constitutional?

"(d) Could the legislature itself enact an eight-hour work day?

"2. If some regulation of hours of labor is within the delegated field of the police power under the *Milwaukee* city charter, the ordinance in question is unreasonable.

"3. The ordinance is not authorized by the *Milwaukee* city charter as subsidiary to the eighth division of the general welfare clause. Neither is authority impliable from any charter provisions granting the right to contract for public work.

"4. Even if authority to in some manner regulate labor on public works may be implied from any provisions of the *Milwaukee* city charter, the ordinance in question is not a proper exercise of such authority because it conflicts with other express provisions of said charter."

The ordinance in question as set forth in the findings of fact by the court is as follows:

"Section 562. The service or employment of all laborers and mechanics who are now or who may hereafter be employed by the city of *Milwaukee,* or by any contractor, or subcontractor, upon any of the public works of this city, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the city government or any such contractor or subcontractor, whose duty it shall be to employ, direct or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in case of extraordinary emergency, as in case of war, fire, flood or danger to life or property."

"Section 563. Any officer of the city government, or any contractor, or subcontractor, and where such contractor, or subcontractor, is a corporation, any officer, manager or agents of such corporation, whose duty it shall be to employ, direct or control any laborer or mechanic employed in any public works of the city, who shall violate any provision of the foregoing section, for each and every offense, shall, upon conviction, be punished by a fine not to exceed twenty-five dollars, or to imprisonment in the house of correction of Milwaukee county for not more than thirty days."

The general welfare clause, so called, of the charter of the city of *Milwaukee* is as follows:

"The common council shall have the management and control of the finances and of all the property of the city, except as in this act otherwise provided, and shall likewise, in addition to all other powers herein vested in them, have full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend and repeal all such ordinances, rules, by-laws and regulations for the government and good order of the city—for the benefit of the trade, commerce and health thereof—for the suppression of vice—for the prevention of crime—and for carrying into effect the powers vested in said common council, as they shall deem expedient; and to declare and impose penalties, and to enforce

the same against any person or persons who may violate any of the provisions of such ordinances, rules, by-laws and regulations. And such ordinances, rules, by-laws and regulations are hereby declared to be, and have the force of law, provided, that they be not repugnant to the constitution of the United States or of this state."

This provision should be read in connection with ch. 678 of the Laws of 1913 (sec. 925—52*c*, Stats.), known as the Home Rule Act:

"1. All cities of the first class in this state are hereby granted the powers necessary to give full force and effect to the intention hereof.

"2. Whenever the legislature has heretofore granted to any city, however incorporated, a general welfare clause, preceded or followed by specific grants of power, such specific grants shall not be construed as restrictions upon such general welfare clause, but such general welfare clause shall be given a liberal construction, to the end that the cities may exercise all powers granted therein or reasonably implied therefrom.

"3. All statutes enacted by the legislature granting to such cities any powers or prescribing the method and manner of executing said powers shall be given a liberal construction, to the end that such cities shall be given the largest possible power and leeway of action under such statutes.

"4. Whenever the legislature has heretofore or may hereafter grant any such city power to do anything, such power shall be construed as including all things necessary to carry out said grant; and whenever, in construing any statute granting any powers or any rights to cities, there shall arise merely a question of doubt as to whether the legislature intended to grant any power or right, whether expressed or implied, such doubt shall be resolved in favor of the city possessing such power or right, whether such power or right shall concern the above or the manner of carrying out any power or right."

Ch. 199 of the Laws of 1897 is as follows:

"In all cases of convictions in actions brought to recover a penalty imposed under the provisions of any ordinance passed by any city in the state of Wisconsin of the first class,

whether organized under the provisions of the general law or operating under a special charter granted by the legislature of this state, to recover a penalty or forfeiture for the violation of any of the ordinances, rules, regulations or by-laws of any such city, the court or magistrate having jurisdiction of such action shall enter judgment for such penalty or forfeiture, together with the costs of prosecution, against the defendant, and shall also enter a judgment that such defendant be imprisoned in the county jail or the house of correction of the county in which such city shall be situated, until such judgment be paid, but in such cases the court shall limit the time of imprisonment, which in no case, however, shall exceed the term of six months, and shall forthwith commit the defendant accordingly."

The constitution of this state (sec. 3, art. XI) not only empowers the legislature to provide for the organization of cities and incorporated villages, but makes it its duty to do so. The city of *Milwaukee* is a body politic and corporate and is established by law (1) to assist in the civil government of the state, and (2) to regulate and administer the internal or local affairs of the territory within its corporate limits, and as such it has such powers as are expressly granted to it and such others as are necessary and convenient to the exercise of the powers expressly granted. 1 Dillon, Mun. Corp. (5th ed.) § 31; *Gilman v. Milwaukee,* 61 Wis. 588, 21 N. W. 640; *State ex rel. Elliott v. Kelly,* 154 Wis. 482, 143 N. W. 153.

In its capacity as a governmental agency the city is charged with the duty of determining the necessity and the extent and general character of all public improvements, including streets, sewers, public buildings, lighting works, waterworks, and other public works, and of providing for their construction and maintenance; and on its proprietary side it lets contracts for the erection and construction of all public works and carries on many activities of a kind which in a general way resemble those of a private corporation, although everything inures to the benefit of the people. This distinc-

tion as to the different capacities in which municipal corporations act is important and is so well grounded as to be a part of the law of the land. *Oliver v. Worcester,* 102 Mass. 489; 1 Dillon, Mun. Corp. (5th ed.) § 110; *Covington v. Kentucky,* 173 U. S. 231, 19 Sup. Ct. 383; *State ex rel. McCurdy v. Tappan,* 29 Wis. 664.

Sec. 3, art. XI, of the constitution contains the following provision:

"It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

It has been held that cities charged with the duty of providing public improvements are, unless restricted by act of the legislature, limited only by the object and purpose of their creation. *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 80 N. W. 1113.

The city of *Milwaukee* is charged with the duty of providing public works within the city, and its powers are very broad in carrying out the legislative purpose, subject only to the constitutional limitations as to indebtedness and the restrictions imposed by the legislature.

The state may limit, and it has by legislative enactment limited, the hours of labor on public works which are contracted for by the state or any officer or agent thereof:

"Section 1729*m*. 1. Each and every contract hereafter made for the erection, construction, remodeling or repairing of any public building or works, to which the state or any officer or agent thereof is a party, which may involve the employment of laborers, workmen or mechanics, shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor, agent or other person, doing or contracting to do all or a part of the work contemplated by the contract, shall be permitted to work more than

eight hours in any one calendar day, except in cases of extraordinary emergencies.

"2. The phrase 'extraordinary emergencies,' as used in this section, shall mean and include only such as grow out of the necessity of protecting property or human life when endangered by reason of an attack by the public enemy or endangered from fire, flood or storm.

"3. This section shall apply only to such work as is actually performed on the premises on which such buildings or works are being erected, constructed, remodeled or repaired."

While the statute was enacted in 1909, its validity has, so far as we are aware, never been challenged. The validity of a statute very similar, except that by its terms it extended to contracts for public work by any city or other municipality, was sustained by the supreme court of the United States as well as by the supreme court of the state of Kansas. It was sustained by both courts on the ground that the state has the inherent power as a sovereignty to prescribe the conditions under which public work shall be carried on.

"Whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work *for it or for one of its municipal agencies,* should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." *Atkin v. Kansas,* 191 U. S. 207, 222, 24 Sup. Ct. 124.

In 1892 Congress enacted a law (27 U. S. Stats. at Large, 340, ch. 352) "relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia." The act limits the service and employment of all laborers and mechanics employed by the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the District, to eight hours in any one calendar day, and makes it unlawful to require or permit any such laborer or mechanic to work more than eight hours in any one calendar day, except in case of extraordinary emergency, and then provides that any person violating the law may be punished by fine or imprisonment or by fine and imprisonment. It was claimed that the statute was unconstitutional. The court said:

"The contention that the act is unconstitutional is not frivolous, since it may be argued that there are relevant distinctions between the power of the United States and that of a state. But the arguments naturally urged against such a statute apply equally for the most part to the two jurisdictions, and are answered, so far as a state is concerned, by *Atkin v. Kansas,* 191 U. S. 207, 24 Sup. Ct. 124. In that case a contractor for work upon a municipal boulevard was sentenced to a fine under a similar law of Kansas, and the statute was upheld. We see no reason to deny to the United States the power thus established for the states. Like the states, it may sanction the requirements made of contractors employed upon its public works by penalties in case those requirements are not fulfilled. It would be a strong thing to say that a legislature that had power to forbid or to authorize and enforce a contract had not also the power to make a breach of it criminal; but however that may be, Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy, and may punish a departure from that way. It is true that it has not the general power of legislation possessed by the legislatures of the states, and it may be true that the object of this law is of a kind not

subject to its general control. But the power that it has over the mode in which contracts with the United States shall be performed cannot be limited by a speculation as to motives." *Ellis v. U. S.* 206 U. S. 246, 255, 256, 27 Sup. Ct. 600.

The power of the state as well as of the United States to limit the hours of labor upon public works in no way involves the exercise of the police power, but is a power incidental to and inherent in its right to contract for public works and to specify the conditions under which labor upon public works shall be performed. So far as this case is concerned, the question of whether or not the city of *Milwaukee* may in the exercise of its police power limit the hours of labor upon public works drops out of consideration. The law being based upon the inherent power of the federal government and of the state and state agencies to contract, all questions of discrimination and classification are also eliminated.

It being established that the state has the power to limit the hours of labor on public works, including public works for its municipalities, has the city of *Milwaukee* such power?

The power to prescribe the conditions upon which public work shall be carried on is undoubtedly primarily in the state. When the state speaks its voice is law. The city is simply an agency of the state, and as such has only such powers as are conferred upon it expressly or by implication. The state of Wisconsin has not attempted to prescribe the conditions under which public work shall be carried on within the cities of this state. Cities are charged with the power and duty of determining the necessity for public works, their extent and character, and, subject to the constitutional limitation as to indebtedness and certain prescribed rules of procedure, the whole subject of providing for public works within a city is committed to the common council of the city. The whole matter of providing public works being delegated to the city, the city has, as an incident to its power to contract for the erection and construction of public works, the same

inherent power to prescribe the conditions under which the work shall be carried on within the city, in the absence of any restriction by the state, that the state has, and it may exercise this inherent power unless and until it is restricted by legislative enactment.

The city having, as incident to its power of contracting for public works, the power to prescribe the conditions upon which work shall be done, including the power to fix the hours during which those employed shall be permitted to labor, may it enforce its will in that respect by an ordinance and punish the violation of the ordinance by the imposition of a penalty?

If express authority to do this must be found in the charter of the city, its power to enact ordinances for carrying into effect the powers vested in it and to declare and impose penalties and enforce the same, given by the general welfare clause, is amply sufficient to sustain the enactment of the ordinance in question. The fact that in its proprietary capacity it may as a part of its contractual powers have the incidental authority to limit the hours of labor on public works, does not prevent it in its governmental capacity from enforcing the limitation by ordinance. "The government purely as contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its power to make a law." *Ellis v. U. S.* 206 U. S. 246, 256, 27 Sup. Ct. 600.

Upon the adoption of an ordinance it has by the general welfare clause the force and effect of a law, and becomes, therefore, a part of every contract relating to public works within the corporate limits of the city of *Milwaukee.* The existing law of the land is a part of every contract and must be read into it. 6 Ruling Case Law, p. 855.

The city may by the express terms of its charter enforce the ordinance by the imposition of a penalty. The penalty is imposed, not for the breach of a contractual obligation, but

for the violation of the terms of the ordinance. The ordinance in question is no more nor no less a part of the contract than are many other ordinances of the city relating to the conduct of its business. Violations of rules and regulations for the use of water supplied by a municipality may be and often are punished by penalties, although the relation between the municipality and the consumer is usually a subject of contract.

The ordinance provides that any person violating it "shall upon conviction be punished by a fine not to exceed twenty-five dollars or to imprisonment in the house of correction of Milwaukee county for not more than thirty days." While it is true that the authority to punish violations of municipal ordinances by imprisonment must ordinarily be expressly conferred and will not be implied (2 Dillon, Mun. Corp. (5th ed.) § 625), it is not necessary to decide that point in this case.

The judgment in this case is that the defendant "pay a penalty . . . or in default thereof be committed to the house of correction for Milwaukee county, Wisconsin, for a term not to exceed thirty days." The judgment in this case is therefore for a penalty imposed under the provisions of an ordinance passed by a city of the first class, and in accordance with the provisions of ch. 199, Laws 1897, the court was required to enter the judgment in the form adopted in this case.

This being a civil action for forfeiture, we do not decide whether that part of the ordinance providing that a violation thereof shall be punished by a fine or imprisonment, so far as imprisonment is concerned, is a valid enactment. The judgment in this case being in accordance with the general law, the question is not before us.

The charter of the city of *Milwaukee,* in common with most municipal charters in this state, requires that all public contracts be let to the lowest bidder, and the ordinance in

question is said to be in conflict with that provision of the charter. If there is such conflict the charter must of course prevail. The trial court found that the cost of public work would be materially increased if the ordinance was enforced, and it is said for that reason contracts cannot hereafter be let to the lowest bidder. The charter does not require public work to be done at the lowest possible cost. The cost of public work is affected by many considerations, one of which is the cost of labor, another is the cost of materials, and there are many other considerations. The right to specify the grade of the material to be used does not limit the city to the specification of the cheapest grade of material. It may exercise its discretion in that respect. When the specifications are complete, including the prescribed limitation as to the hours of labor for men to be employed upon public work, all bidders are on the same footing, and the one bidding the lowest sum is the lowest bidder within the meaning of the charter.

Is the ordinance unreasonable, assuming that the city has power to enact it?

It is said to be unreasonable (1) because no provision is made for overtime, and (2) because, as appears from the findings of the court, it would be practically impossible to carry on the construction of public works if the ordinance should be strictly observed and enforced. The findings of the trial court upon this branch of the case are full and complete. The court found that the performance of the work called for by the contract under which the defendant was working at the time of the commission of the offense, required the employment of miners, so called, who are skilled laborers accustomed to doing tunneling and providing shoring and timbering as a part of the digging of sewers and work of the kind in question, and that the work likewise required the hiring of carpenters, and engineers to operate the necessary machinery for supplying the miners with air; that

the proper performance of said work required that the carpenters would often be employed when the miners themselves were not busy, in order to supply the said miners with timbering and material prepared by the carpenters to keep the said miners busy during their usual hours of labor; that it was necessary to have engineers employed prior to the time that the regular miners began their regular day shifts, in order that the machinery necessary to be operated while the miners were at work would be ready for operation when the regular miner crew started to do its work, it being necessary for at least one engineer to be on duty for at least an hour before the regular tunnel crew went to work. The court also found that the expense of doing the work in question under an eight-hour schedule would exceed the cost of doing the work by a ten-hour schedule by at least twenty per cent.; that the cost of street pavement would be largely increased; that the cost of the erection of public buildings in the city of *Milwaukee* will be largely in excess of what the same work could be done for under a ten-hour schedule.

We must assume in the first place that the ordinance will be reasonably construed and applied. It seems to us plain that the intention is that work heretofore done usually, ordinarily, and customarily during the nine- or ten-hour period shall be done by persons employed upon public works for eight hours instead of nine or ten hours. For instance, a teamster who begins his ten-hour day must have fed and cared for his team. He receives ten hours' pay and is ordinarily and customarily said to work ten hours. A fireman who banks his fires as a part of the usual day's work, although the entire period in which the service is rendered may extend beyond the ten-hour period, is said to work but ten hours.

So far as a provision for overtime is concerned, it must be apparent upon the slightest consideration that a provision for overtime would simply fix the compensation received and

would not limit the hours of labor of those employed upon public works. We cannot say, as applied to the facts in this case, that the ordinance is unreasonable, especially since it appears that the federal law has been in force since 1892 and the state law since 1907 and public work is being carried on under each of them. As to cognate questions which may arise under this ordinance and are not presented by this record, we do not express an opinion.

Many matters have been urged in support of the argument that the law is invalid which raise only questions of public policy, and, as has been said, with this the courts have nothing to do. In disposing of similar contentions made before it, the supreme court of the United States said:

"So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed its constitutionality is beyond all question. . . . We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not,

by its regulations, infringe the personal rights of others; and that has not been done." *Atkin v. Kansas,* 191 U. S. 207, 223, 224, 24 Sup. Ct. 124.

Without expressing any opinion, impliedly or otherwise, that such is the fact, if legislation of the character now before us is mischievous in its tendencies and results in increased tax burdens, the remedy rests with the people themselves. The remedy is legislative and political and is not to be found in the judicial field. The field of legislative discretion is broad, and as long as legislative bodies stay within its limits their enactments are the law of the land. We conclude, therefore, that the ordinance in question is valid and that the defendant was properly convicted and sentenced.

By the Court.—Judgment affirmed.

STATE EX REL. WIXON, Respondent, vs. CLEVELAND, Appellant.

October 5—October 24, 1916.

Constitutional law: Justices' courts: Jurisdiction.

Ch. 423, Laws 1911,—providing that justices of the peace shall not, in counties containing a city of the first class, have jurisdiction of garnishment, replevin, or attachment actions or of bastardy proceedings, nor, in cities of the first class, of actions for forcible entry and detainer,—was within the power of the legislature, under sec. 15, art. VII, Const. of Wis., and does not contravene either sec. 9, art. I, Const. of Wis., or amendm. XIV, Const. of U. S.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining petitioner's demurrer to defendant's return to an alternative writ of prohibition.

The defendant is a justice of the peace in West Allis, a city of the fourth class and one of several cities within Milwaukee county, in which county is also a city of the first class.

The defendant, as such justice of the peace, upon the petition of a resident of West Allis issued a summons in garnishment against the petitioner herein as defendant and his employer, the Allis-Chalmers Manufacturing Company, as garnishee defendant. Upon petitioner's application the circuit court for Milwaukee county issued an alternative writ of prohibition to the defendant upon the ground that his so acting was in violation of ch. 423, Laws 1911. The defendant made return to such writ, alleging in substance as a justification that he was proceeding as such justice of the peace in and for said city of West Allis pursuant to sec. 3716, Stats., relating to garnishment and attachment in justice's court, and in exercise of his judicial power commensurate with the necessities of the people of said city of West Allis and in such a manner as to promote their interests and convenience; that ch. 423, Laws 1911, is unconstitutional in that it is in violation of sec. 15, art. VII, of the Wisconsin constitution and deprives the people of West Allis of certain judicial remedies without substituting in their stead other remedies by which defendant could enforce his judgments and decrees. A demurrer to such return was sustained by the circuit court and an appeal taken.

Joseph E. Tierney, for the appellant.

John S. Kaney, attorney, and *Clifton Williams,* of counsel, for the respondent.

Eschweiler, J. The effect of this proceeding is to again challenge the power of the legislature to pass ch. 423, Laws 1911, which provides that in all counties containing a city of the first class, thereby designating Milwaukee county, no justice of the peace in said county shall have jurisdiction or cognizance over the actions of garnishment, replevin, attachment, and bastardy proceedings, and that justices of the peace of the city of Milwaukee shall not exercise jurisdiction in actions of unlawful entry and detainer.

The legislature by ch. 549, Laws 1909, created the civil court of Milwaukee county, designed to take the place, to a large extent, of the courts of justices of the peace in said county. That law provided for holding branches of said court from time to time in different parts of Milwaukee county, which provision would include the city of West Allis and other cities. The jurisdiction taken away by ch. 423, Laws 1911, is now vested in such civil court.

It is contended by defendant in his return that this depriving the justices of the peace of a city like West Allis of their former jurisdiction over the actions specified in said ch. 423 is a serious curtailment of the rights and remedies of the citizens of West Allis and places them at a great disadvantage in that they are compelled to travel to the city of Milwaukee for such relief, and that such legislation is in violation of the rights secured to them by sec. 9, art. I, of the Wisconsin constitution, relating to remedy for wrong. In appellant's brief it is also claimed that his rights secured by the Fourteenth amendment to the United States constitution are violated.

The right of the people to have courts of justices of the peace is firmly secured by sec. 15, art. VII, Const., providing for the election of such officers, but that section also contains the following: "The justices thus elected shall have such civil and criminal jurisdiction *as shall be prescribed by law.*"

In the case of *State ex rel. Burke v. Hinkel,* 144 Wis. 444, 129 N. W. 393, this court held that under this constitutional provision just quoted the legislature could not enact a law which amounted to a practical abrogation of the powers of such justices. On the other hand, it was held in the case of *State ex rel. McLogan v. Burke,* 161 Wis. 429, 154 N. W. 627, that the limitations upon the number and powers of justices of the peace in Milwaukee county prescribed in this precise chapter under question, ch. 423, Laws 1911, and chs. 424 and 468 of the same year, were within the power of the legislature and not unconstitutional. The precise question, therefore, as here raised has already been passed upon and determined by

this court in the case last cited, which involved a still greater restriction upon the powers of the justices of the peace for Milwaukee city than is the situation here and settles the law upon this particular statute. It necessarily determined that there is no denial of any one's rights under sec. 9, art. I, Const. There is no ground for claiming that it is a violation of the Fourteenth amendment to the federal constitution.

The order of the circuit court should therefore be affirmed.

By the Court.—Order affirmed.

STERLING ENGINEERING & CONSTRUCTION COMPANY, Respondent, vs. MILLER and another, Appellants.

October 5—October 24, 1916.

False representations: Pleading: Joinder of causes of action: Damages: Real-estate brokers: Commissions.

1. A complaint alleged that plaintiff placed the sale of real estate with certain brokers; that defendant R. brought the other defendant, M., to plaintiff to purchase the property, and they falsely represented that M. alone was interested in the purchase, that none of said brokers had presented the matter of a purchase to them, and that R. was the only person who, as a real-estate agent, had presented the matter to M.; that plaintiff, relying on such representations, sold, and conveyed the property to M. and paid R. a commission of $1,200 for making the sale; that in fact said R. and M. were jointly interested in the purchase and shared the commission, and the truth was that certain of said brokers had previously negotiated with M. to sell him the property; that after the sale to M. plaintiff was sued for commissions by two of such brokers; that defendants, R. and M., refused a tender of the defense of such actions, and were witnesses therein; that in those actions the brokers recovered judgments against plaintiff, which were satisfied by plaintiff; and that plaintiff incurred large expense in defending those actions. Plaintiff sought to recover from R. and M., as a first cause of action, the amounts paid to satisfy said judgments and the expenses incurred; and, as a second cause of

action, the $1,200 paid to R. as a commission. *Held*, on demurrers, that the facts stated constituted a single cause of action for false representations, with several items of damage.

2. The expenses incurred in connection with the defense of the actions brought by the brokers were recoverable, such defense having been warranted by the representations made to plaintiff by R. and M.

3. But the amounts paid to satisfy the judgments in those actions are not recoverable, because it must be assumed that the brokers established therein their rights to commissions, and the representations made by the defendants herein could not have altered those rights.

4. The amount of the commission paid to defendant R. is recoverable, because R., being jointly interested in the purchase, without knowledge of the plaintiff, was not lawfully entitled to any commission.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The appeal is from an order overruling demurrers to two separate causes of action in plaintiff's amended complaint.

The substance of the complaint is that the plaintiff corporation owned and desired to sell certain real estate in the city of Milwaukee. It placed the sale with certain real-estate dealers prior to December 1, 1911. On that date the defendant *Routt* brought the defendant *Miller* to plaintiff to purchase the property, and during the subsequent negotiations the following representations are charged to have been made by the defendants: (1) that the defendant *Miller* was alone interested in the proposed purchase; (2) that none of the other real-estate dealers to whom plaintiff had intrusted the sale and who were then specifically named to defendants had presented the matter of a purchase of the property to defendants, or in any way acted as agents therefor; (3) that defendant *Routt* was the only one to present the same to defendant *Miller* as real-estate agent.

It was also recited that plaintiff, believing and relying upon such representations, conveyed the property to defendant *Miller* and paid defendant *Routt* $1,200 as a commission

for making such sale to defendant *Miller;* that the truth was that certain of the aforesaid real-estate agents had negotiated with defendant *Miller* to sell him this property before December 1, 1911, and that defendant *Routt* was jointly interested with defendant *Miller* in the purchase and shared said $1,200 commission with him; that subsequent to the sale to *Miller* plaintiff was sued by two of such real-estate agents for commission, having so negotiated between plaintiff and defendant *Miller;* that the defense of said two actions was tendered by plaintiff to defendants and refused; that defendants were witnesses in such actions; that ultimately judgments were entered against plaintiff in these two actions of $2,147.45 and $4,857.34 respectively, which judgments were satisfied by plaintiff paying $1,500 and $2,000 respectively; that plaintiff in defending said actions was put to large expense for court costs, counsel fees, loss of time and expense of officers and agents of the plaintiff.

In what is denominated the first cause of action the plaintiff seeks to recover what it paid in the two lawsuits, namely, $1,500 and $2,000, also all additional expense and damages in the two actions in connection with the defense thereof, and in the second cause of action is sought to be recovered the $1,200 paid defendant *Routt* as commission; in all $10,000 is demanded. Demurrers were interposed to these two causes of action respectively, and from the order overruling each of such demurrers an appeal is taken to this court.

For the appellants there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

G. J. Davelaar, for the respondent.

Eschweiler, J. From the foregoing statement of the facts relied upon by plaintiff to maintain this lawsuit it is apparent that all could have been stated as one cause of action which resulted in several items of damage.

The allegations of the complaint are sufficient to support an action for false representations. *Woteshek v. Neuman,* 151 Wis. 365, 138 N. W. 1000; *Brown v. Ocean A. & G. Corp.* 153 Wis. 196, 140 N. W. 1112; *Westra v. Roberts,* 156 Wis. 230, 145 N. W. 773; *Rogers v. Rosenfeld,* 158 Wis. 285, 149 N. W. 33; *Winnek v. Moore, ante,* p. 53, 159 N. W. 558.

In the so-called first cause of action there is sought to be recovered not solely the amounts of $1,500 and $2,000 paid by plaintiff in satisfaction of the two judgments obtained against it by the two real-estate firms, but also expenses and damages incurred in connection with the defense of those actions, and as it thereby states a good cause of action for some of the relief demanded, the demurrer to that portion of the complaint must be overruled.

If plaintiff was influenced to enter into litigation with those other agents and defend either one or both of those lawsuits, incurring expense and damage thereby, by reason of the false representations of defendants that *Routt* alone was instrumental in procuring the sale to *Miller,* then for such expense and damage it may recover. Manifestly, if such were the fact, then no one other than *Routt* could lawfully be entitled to a commission for the sale to *Miller,* and plaintiff would have been warranted in defending those lawsuits upon such representations to and belief by it as to the facts.

But as to the amounts of $1,500 and $2,000 paid in settlement of the two suits for commission and sought to be recovered here the situation is different. It was, by the judgments in those two actions, judicially determined that the respective plaintiffs therein were, as real-estate agents, lawfully entitled to such amounts for their services in negotiating with *Miller* on plaintiff's behalf for the sale of the property. It must, under the allegations of the complaint herein, be assumed that in those actions they satisfied the court that they had obtained *Miller* as a purchaser ready, willing,

and pecuniarily able to purchase at a price agreeable to plaintiff. This gave them a right to a commission as against plaintiff. *McCabe v. Jones,* 141 Wis. 540, 124 N. W. 486. The right of such agents accrued prior to the completion of the sale to *Miller* and existed by reason of the several contracts between them and plaintiff. Anything that might have been said or done between plaintiff and defendants herein could not affect the rights of those other agents, and whatever representations, false or true, were made by defendants and relied upon by plaintiff could not have altered the existing rights of those agents as against the plaintiff. The plaintiff cannot now question those judgments nor shift the burden for the amounts thereof upon defendants in this action, and to the extent of the amounts paid to satisfy those judgments, viz. $1,500 and $2,000, it cannot recover in this action.

As to the claim for $1,200 commission paid to the defendant *Routt,* set forth in the second cause of action, the allegations of the complaint show that plaintiff, believing that defendant *Miller* had not been approached by any one else as agent than the defendant *Routt,* and that *Routt* was not interested other than as such agent in such purchase, sold to *Miller* and paid commission to *Routt.* The relationship which it is alleged existed in fact between the defendants made them jointly interested in the purchase, and was such that defendant *Routt* could not be lawfully entitled to a commission for what would be, in effect, negotiating a sale to himself. He cannot occupy the two inconsistent positions of agent for the seller, bound to exercise the utmost good faith towards his principal, and at the same time be a purchaser of the property with his own personal interests first to be subserved. The law refuses to such undisclosed purchaser any right to a commission. *Stewart v. Mather,* 32 Wis. 344, 350; *Tasse v. Kindt,* 125 Wis. 631, 633, 104 N. W. 703.

By the Court.—Order affirmed, and the cause remanded for further proceedings in accordance with this opinion.

QUAST and another, Respondents, vs. GUETZKOW, Appellant.

October 5—October 24, 1916.

Building contracts: Arbitration: Condition precedent to action: Certificate of architect: Waiver: Estoppel.

1. Where a building contract provides that any disagreement as to matters under it shall be adjusted by arbitration, but does not provide that arbitration shall precede an action on it, arbitration, if not requested, is not a condition precedent to the right to maintain such an action.
2. In such a case silence of the defendant on the subject of arbitration until after the commencement of the action, and failure to plead the matter in abatement or as a defense, was a waiver thereof.
3. Where no controversy arises as to matters within the scope of the arbitration clause in a contract, or where a controversy is settled by agreement of the parties, no reason exists for an arbitration.
4. Where the owner accepted, as being in accordance with a building contract, the work done thereunder, and promised to pay an agreed sum therefor as a complete settlement, and thereafter remained silent as to the architect's certificate provided for in the contract until after an action was brought against him for said agreed sum, he is precluded both by waiver and by estoppel from defeating the action on the ground that the certificate had not been procured.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action to foreclose a mechanic's lien.

The judgment was for $436.47, rendered February 10, 1916. Plaintiffs performed the work and furnished the material for which they claimed a lien, in part, under a written contract, and in part under a verbal request of the proprietor. The contract provided, among other things, that, in case of any disagreement relating to the plans or specifications for the building, the architect should pass upon the same and thereby bind the parties, and in case of any disagreement as to the value of extra work or deductions for unfinished work, or any other matters under the contract, it should be adjusted

by arbitration. It was further provided that the contract price should be paid, eighty-five per cent. as the work progressed, on the architect's written certificate of the facts, and the balance on a final architect's certificate of completion.

The complaint contained all allegations essential to a recovery, but did not set out the written contract or plead its provisions. Defendant admitted an indebtedness on plaintiffs' claim of $276.25 on the contract and $36.24 for extras, alleged that the contract was negligently performed in some particulars, and counterclaimed on that for damages, and for some material furnished. Neither breach of the condition as to arbitration, nor architect's certificates was specially claimed as a defense or referred to other than by making the written contract a part of the answer. As to whether performance of such conditions was requisite to a judicial remedy to recover, this was found by the court: May 20, 1915, defendant accepted the work as having been done in accordance with the written agreement and the requests for extras and promised to pay therefor the amount claimed in the complaint—$322.34. The work was done as required by the contract except as changed by defendant. No disputes or disagreements arose between the parties concerning the value of the extra work. No offer or request as to arbitration was made by defendant.

Upon such findings, and others requisite therefor, judgment was rendered as prayed for in the complaint.

For the appellant the cause was submitted on the brief of *Leon B. Lamfrom.*

For the respondents there was a brief by *Houghton, Neelen & Houghton,* and oral argument by *Albert B. Houghton.*

Marshall, J. The findings of fact are sustained by the evidence. No question is raised on that score. Appellant's counsel submit for consideration these two propositions:

1. Was arbitration as to all matters in controversy under

the contract a condition precedent to the right of plaintiffs to maintain an action thereon?

2. Was the architect's certificate of completion of the building according to contract a condition precedent to plaintiffs' right to maintain the action?

It is a sufficient answer, in the negative, to the first proposition, that the contract did not provide that arbitration should precede an action upon it. Under such circumstances the rule is that arbitration is unnecessary, unless requested, and no request was made. *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 13 N. W. 252; *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, 51 N. W. 1122; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 62 N. W. 422.

A further sufficient answer to counsel's first proposition is that silence on the subject of arbitration until after the commencement of the action, and failure to plead the matter in abatement, or as a defense, was a waiver thereof. *Vangindertaelen v. Phenix Ins. Co., supra.*

A further good answer is the fact that the parties settled between themselves the amount due upon the contract, so there was nothing to arbitrate. An arbitration clause in a contract does not have vitality unless there is a controversy as to some matters falling within the scope of it. In case such a controversy arises, but is settled by agreement of the parties, no reason exists for resorting to the contract method of adjusting it.

The second proposition must be answered in favor of respondents because the settlement between the parties was a most effectual waiver of the architect's certificate, as was also the failure to object, at any time, to payment without such certificate. The contract provided that, as to the final payment, as well as the others, the plaintiffs should obtain a certificate of the architect to the effect that he considered such payment properly due. Appellant might have insisted upon that; but when he, in the absence of the certificate, accepted

the work as having been done in accordance with the contract and agreements as to extras, and promised to pay an agreed sum as a complete settlement, he certainly could not remain silent as to the certificate until the action was brought and then defeat respondents, because no certificate was obtained. Such a provision of a building contract as that in discussion may be waived by conduct suggesting that it will not be insisted upon, relied upon by the contractor, so that a change of position by the proprietor, if allowed to be effective, would operate injuriously to the opposite party.

Under the circumstances disclosed here, appellant is precluded by estoppel as well as waiver from prevailing upon the ground of the architect's certificate not having been procured. Failure to pay was not based on the absence of such certificate, and want of it was not pleaded as a defense. The logic of *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136, applies.

By the Court.—The judgment is affirmed.

Chicago & Northwestern Railway Company, Appellant, vs. Pulp Wood Company, Respondent.

October 5—October 24, 1916.

Carriers: Embargo: Cars furnished for one commodity and loaded with another: Refusal to accept: Demurrage: When transportation begins.

1. Upon being refused cars for pulp wood because of an embargo thereon, a shipper ordered cars for loading tan bark, but loaded them with pulp wood and demanded acceptance of the shipment. The railway company refused to accept the cars and demanded that they be unloaded. The shipper refused to unload, and the railway company did not remove the pulp wood from the cars, but after the embargo had been raised accepted the shipment for transportation. *Held,* that the cars were not used

in transportation, within the meaning of sec. 1797—4, Stats., until the acceptance of the shipment, and hence were not subject to a demurrage charge for the time they were held on the tracks before such acceptance.

2. The service of such cars prior to the two days' free time allowed for loading them under the car-service rules was not a service in connection with transportation as contemplated by sec. 1797—4, Stats.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The action is brought by plaintiff against defendant, as a consignee, for the recovery of demurrage charges on an intrastate shipment of cars pursuant to demurrage tariffs filed with the Wisconsin railroad commission.

The plaintiff, as a common carrier, does an interstate and intrastate business. Its railroad connects with the Wisconsin Central Railway Company at Neenah and Menasha, Wisconsin. The defendant is a corporation duly organized and existing by virtue of the laws of the state of Wisconsin and is engaged as a buyer of pulp wood. Plaintiff company had complied with ch. 362, Laws 1905, by filing schedules showing its rates, fares, and charges for intrastate transportation of property, including its schedules for demurrage charges. Prior to the 26th day of May, 1908, the shipments of pulp wood and forest products were very far in excess of normal, which caused the tracks of plaintiff at Appleton to become badly congested, including those tracks which served defendant. Because of this congestion, cars of pulp wood and other commodities could not be placed on plaintiff's tracks at Appleton and be unloaded in due time. Defendant was under contract to purchase for and deliver to different companies pulp wood, including the wood here involved. In order to relieve this congestion the Wisconsin Central Railway Company issued an embargo or blockade notice on the 26th day of May, 1908, directing its agents to furnish no more cars for loading pulp wood consigned to Appleton, Wisconsin, until

the congestion had ceased. The plaintiff also issued notices of embargo on pulp wood consigned to Appleton. Due notice of this embargo was given to the defendant company and to G. Wilkinson at Mellen, Wisconsin. Wilkinson, when refused cars for pulp wood, ordered eleven cars from the Wisconsin Central Railway Company for loading tan bark. These cars were delivered to Wilkinson shortly after May 26, 1908, who loaded them with pulp wood and demanded that the Wisconsin Central Railway Company accept the same and transport them to the connecting point with the plaintiff's line to forward and deliver them to the defendant at Appleton. The Wisconsin Central Railway Company refused to accept the cars loaded with pulp wood and demanded of Wilkinson that he unload the cars, and notified him that in default thereof the cars would remain as they were until after the embargo was raised. Wilkinson, defendant, and the railroads communicated by letters, and finally, when defendant agreed to take such pulp wood, it notified the plaintiff and the Wisconsin Central Railway Company that it would not be liable for any demurrage charges which might be claimed on the cars and that it would not receive the cars if it was to be charged with any demurrage. The Wisconsin Central Railway Company transported the cars, after the raising of the embargo, to the point where its line connects with the plaintiff company and tendered the cars to the plaintiff company, demanding prepayment of freight, demurrage, and other transportation charges. Plaintiff company accepted the cars and paid all the freight, demurrage, and transportation charges, which included the sum of $711 for demurrage. Before the commencement of this action plaintiff demanded of defendant the payment of these charges and defendant refused and still refuses payment of any demurrage charge.

The case was submitted to the court upon the above stipulated facts and the circuit court found for the defendant.

Judgment was entered in favor of the defendant and for costs of the action. From such judgment this appeal is taken.

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Louis Quarles.*

Felix J. Streyckmans, for the respondent.

SIEBECKER, J. The question raised upon the admitted facts presents the inquiry: Is plaintiff entitled to recover the amount claimed as a demurrage charge for the service of cars furnished by the Wisconsin Central Railway Company to G. Wilkinson in the light of the facts and circumstances above stated under the tariff and demurrage rules on file with the state railroad commission? The demurrage rules provide which cars are to be subject to car-service charges and the amount thereof per day. The plaintiff contends that the cars in question were subject to demurrage under rule 4, providing:

"Cars which are stopped in transit by orders of shippers or consignees for reconsignment to points beyond, for change of load . . . or on account of improper, unsafe, or excessive loading, or for any other reason for which the shipper or consignee is responsible, shall be subject to car-service charges after the expiration of forty-eight (48) hours from arrival at the point of stoppage, and all car service must be collected, or billed as advances when cars go forward."

The argument is made that the railroad company was required to furnish the cars in question to Wilkinson upon his request, and that the loading of them by him and his refusal to unload the pulp wood upon the demand of the railroad company was a use of them for transportation and a service of the cars in connection therewith authorizing a demurrage charge for such use under secs. 1797—4 and 1797—10, Stats. The facts and circumstances show that a controversy arose between the Wisconsin Central Railway Company and Wil-

kinson from the time the cars were loaded with pulp wood by him instead of tan bark, because he had loaded them with pulp wood which could not then be shipped on account of the embargo. The railroad company refused to accept the shipment and Wilkinson insisted the company should accept it and refused to unload the cars. This disagreement continued until the company accepted the shipment on August 17, 1908, after the embargo had been raised. It also appears that the railroad company refused to receive the shipment under any conditions until August 17th. The undisputed facts of the case show clearly that there was no acceptance of this shipment for transportation before this day. It is evident that Wilkinson's use of the cars for storing the wood up to August 17th does not constitute a use of them on his part for a transportation service. It remains to ascertain the effect of the conduct of the railroad company in dealing with the cars during this period. It is obvious from the facts and circumstances that the pulp wood was not accepted by the railroad company for shipment until August 17th. It clearly had a right to remove the pulp wood from the cars when Wilkinson refused to unload it and use the cars as it deemed best during the existence of the embargo. Under the facts and circumstances, the refusal by the railroad company to accept the shipment and its refusal to unload the cars necessarily implies that it did not devote the cars to a transportation of this shipment during the time that they stood at Mellen prior to August 17th, when the company accepted the shipment for transportation. Under these conditions the cars were not used in transportation until acceptance of the shipment for transportation and hence were not subject to a demurrage charge in connection therewith for the period prior to the two days' free time allowed for loading them under the car-service rules. Whatever the nature of the service of these cars may have been prior to such time is not material here. It is obvious that it is not a service in con-

nection with transportation as contemplated by sec. 1797—4, Stats.

The trial court properly held that the Wisconsin Central Railway Company had no claim for demurrage for the time the cars were held on the tracks before they were accepted to transport the pulp-wood shipment, and plaintiff's complaint was properly dismissed.

By the Court.—The judgment appealed from is affirmed.

KERWIN and ESCHWEILER, JJ., took no part.

JESSE A. SMITH AUTO COMPANY, Appellant, vs. KAESTNER, imp., Respondent.

October 5—October 24, 1916.

Mechanic's lien on personalty: Priority over mortgage.

The mechanic's lien given by sec. 3343, Stats., for repairs upon personal property is superior to the lien of a duly filed prior mortgage upon the property.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action of replevin begun in the civil court to recover possession of an electric car. At the time the repairs in question were made plaintiff held a duly filed purchase-money mortgage on the car on which there was due the sum of $50. The defendant *Kaestner,* in whose possession the car was at the time the sheriff seized it under the writ of replevin, had, at the request of the owner, Mary E. Avery, who by the terms of the mortgage was entitled to the use and possession of the car, made repairs on it of the reasonable value, with interest, of $162.10, no part of which had been paid. The civil court

adjudged that the lien of *Kaestner* for repairs was superior to the mortgage of the plaintiff, and upon appeal to the circuit court its judgment was affirmed. The plaintiff appealed.

The cause was submitted for the appellant on the brief of *Raymond J. Cannon,* attorney, and *Bernard V. Brady,* of counsel, and for the respondent on that of *Thomas F. Hayden.*

Vinje, J. Is the mechanic's lien given by sec. 3343, Stats. 1915, superior to the lien of a duly filed prior mortgage on the chattel repaired? That is the sole question presented by the appeal. Sec. 3343 provides that "Every mechanic who shall make, alter or repair any article of personal property at the request of the owner or legal possessor of such property shall have a lien thereon for his just and reasonable charges therefor, and may retain possession of such property until such charges are paid."

In states where only the common-law artisan's lien obtains, or where the statutory lien given is merely declaratory of the common-law lien, there is a conflict of decisions upon the question. Some states, at least as to a certain class of chattels, such as vehicles and machinery needing frequent repairs, hold that there is an implied consent on the part of the mortgagee, when he leaves the chattel in the possession of the mortgagor for use, that it shall be kept in repair and that the lien for such repairs shall take precedence over his mortgage. The cases of *Hammond v. Danielson,* 126 Mass. 294 (hack for hire); *Watts v. Sweeney,* 127 Ind. 116, 26 N. E. 680 (railroad engine); *Drummond C. Co. v. Mills,* 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761 (physician's carriage); and *Reeves & Co. v. Russell,* 28 N. Dak. 265, 148 N. W. 654 (threshing-machine engine), hold the artisan's lien superior because of such implied consent. Other courts negative such implied consent and hold the mortgage lien superior. See *Denison v. Shuler,* 47 Mich. 598, 11 N. W. 402 (engine); *Small v. Robinson,* 69 Me. 425 (hack used for hire); *Shaw*

v. Webb, 131 Tenn. 173, 174 S. W. 273 (automobile); and *Baughman A. Co. v. Emanuel,* 137 Ga. 354, 73 S. E. 511, 38 L. R. A. N. S. 97 (automobile).

In view of the provisions of our statute we need not consider the question of the priority of the common-law lien over an antecedent mortgage. Sec. 3343 expressly gives the mechanic a prior lien when he has made the repairs at the request of the owner or legal possessor of the property, for it says that in such case he may retain possession of the property until his charges are paid. In this case the defendant Avery was the legal possessor of the property and the repairs were made at her request. The clause "and may retain possession of such property until such charges are paid" contains no exception in favor of prior lien claimants, and the court can make none. When the repairs are made at the request of the owner or legal possessor of the repaired property the statute insures possession thereof in the mechanic till his just and reasonable charges are paid.

The legislative declaration that under such conditions the artisan shall have a superior lien is founded upon justice. The repairs made ordinarily enhance the value of the property to the extent of the reasonable value of the repairs, and prior lien claimants are therefore not adversely affected by the superior lien of the artisan, since the value of their security, subject to the artisan's lien, is the same as it was before the repairs were made. Moreover, in view of the conditions under which artisans are called upon to make repairs, often in the nature of emergency work, it would be highly inequitable to charge them with constructive notice of mortgages filed perhaps long distances from where the repairs are made. It was, no doubt, because they have to make repairs under such conditions and because they materially enhance the value of the property intrusted to them that the legislature gave them a prior lien.

By the Court.—Judgment affirmed.

PERELES and another, Executors, Appellants, vs. MILWAUKEE COUNTY, Respondent.

October 6—October 24, 1916.

Vendor and purchaser of land: Sale in gross or by the acre? "More or less."

1. A contract for the sale, for a sum stated, of a tract of land consisting of four separate parcels, each described as containing a given number of acres "more or less,"—aggregating 120.749 acres,—is *held* to have been for a sale in gross, the circumstances being such as to show that the number of acres was referred to only for the purpose of description and that the intention was to sell and to buy all of a certain tract without regard to its exact acreage.
2. The fact, in such case, that the tract contained 129.031 acres, instead of 120.749, did not entitle the vendor to receive a greater sum than the price named, there being no claim of fraud and the discrepancy not being so great as to indicate gross mistake.

[3. What effect should be given to the words "more or less" as used in the contract and prior correspondence, is not decided.]

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint.

For the appellants there was a brief signed by *Pereles, Strouse & Carter,* attorneys, and *Paul D. Durant* and *Alex. L. Strouse,* of counsel, and oral argument by *Alex. L. Strouse.* They contended, *inter alia,* that the sale contemplated by the parties was by the acre and not in gross. Both offer and acceptance were based upon an understanding that the land should be sold at $325 per acre, and the sum of $39,233.40, the total price referred to in the land contract, is calculated by multiplying the number of acres mentioned by the purchase price per acre of $325. The reference to the resolution of the board and to the offer of May 24th was a proper means of determining the intention of the parties.

Sayre v. Wilson, 86 Ala. 151, 5 South. 157; *Phelps v. Henry,* 15 Ark. 297; *Hahn v. Cotton,* 136 Mo. 216, 37 S. W. 919; *Andrews v. Bell,* 56 Pa. St. 343; *Phillip v. Scott,* 2 Watts, 318; *Gordon-Cumming v. Houldsworth,* [1910] A. C. 537, 80 L. J. P. C. 47. Whether a sale is in gross or by the acre does not depend upon whether the payment is to be made in the gross sum or so much per acre, but upon the method of specifying the quantity of land, and depends upon the intention of the parties. *Hall v. McCammon* (Tenn.) 37 S. W. 1026; *McComb v. Gilkeson,* 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944; *Farrier v. Reynolds,* 88 Va. 141, 13 S. E. 393; *Norfolk T. Co. v. Foster,* 78 Va. 413; *Benson v. Humphreys,* 75 Va. 196; *Winton v. McGraw,* 60 W. Va. 98, 54 S. E. 506; *Crislip v. Cain,* 19 W. Va. 438; *Lawson v. Floyd,* 124 U. S. 108, 8 Sup. Ct. 409, 31 L. ed. 347. All facts and circumstances connected with the transaction which tend to show the intention may be considered. *Smith v. Evans,* 6 Bin. (Pa.) 102, 6 Am. Dec. 436; *Benson v. Humphreys,* 75 Va. 196; *Lawson v. Floyd,* 124 U. S. 108, 8 Sup. Ct. 409, 31 L. ed. 347. When the purchase price is an exact multiple of the number of acres, as in the case under consideration, it is an important element to be considered. *Sweet v. Marsh,* 133 App. Div. 315, 117 N. Y. Supp. 930; *Weaver v. Carter,* 10 Leigh (Va.) 37; *Crislip v. Cain,* 19 W. Va. 438. Where there is a matter of doubt the courts favor the construction that the sale is one by the acre; they do not look with favor on contracts of hazard, and the burden is placed upon the party who asserts the contract to be one of hazard. *Hull v. Watts,* 95 Va. 10, 27 S. E. 829; *McComb v. Gilkeson,* 110 Va. 406, 66 S. W. 77, 135 Am. St. Rep. 944. See, also, *Hall v. Graham,* 112 Va. 560, 72 S. E. 105, 27 Am. & Eng. Ann. Cas. 1257. The words "more or less," in cases where the sale was by the acre, cover cases only of slight discrepancies. *Brooks v. Halane,* 116 Ill. App. 383; *Baltimore P. B. & L. Soc. v. Smith,* 54 Md. 187, 39 Am. Rep. 374; *McComb*

v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944; *Grayson v. Buchanan,* 88 Va. 251, 13 S. E. 457; *Benson v. Humphreys,* 75 Va. 196; *Triplett v. Allen,* 26 Gratt. 721, 21 Am. Rep. 320. Even if the sale in question were regarded as a sale in gross, the claimant is entitled to relief. The words "more or less" are intended to cover only a slight excess or deficiency with regard to the quantity conveyed. *Gentry v. Hamilton,* 38 N. C. 376, 379; *Couse v. Boyles,* 4 N. J. Eq. 212, 216, 38 Am. Dec. 514; *Bigham v. Madison,* 103 Tenn. 358, 52 S. W. 1074, 1075, 47 L. R. A. 267 (citing *Belknap v. Sealey,* 14 N. Y. 143, 67 Am. Dec. 120); *Harrell v. Hill,* 19 Ark. 102, 68 Am. Dec. 202; *Drake v. Eubanks,* 61 Ark. 120, 32 S. W. 492; *Stebbins v. Eddy,* 4 Mason, 414, 22 Fed. Cas. 1192; *Pratt v. Bowman,* 37 W. Va. 715, 17 S. E. 210; *Wheeler v. Boyd,* 69 Tex. 293, 6 S. W. 614; *Newton v. Tolles,* 66 N. H. 136, 19 Atl. 1092, 9 L. R. A. 50, 49 Am. St. Rep. 593; *Paine v. Upton,* 87 N. Y. 327, 334, 41 Am. Rep. 371; *Triplett v. Allen,* 26 Gratt. 721, 724, 21 Am. Rep. 320. See, also, *Docter v. Hellberg,* 65 Wis. 415, 27 N. W. 176; *Docter v. Furch,* 76 Wis. 153, 44 N. W. 648, 826; *S. C.* 91 Wis. 464, 65 N. W. 161; *Hackbarth v. Wollner,* 88 Wis. 476, 60 N. W. 704; *Butt v. Smith,* 121 Wis. 566, 99 N. W. 328.

For the respondent there was a brief by *Winfred C. Zabel,* district attorney, *William L. Tibbs,* special assistant district attorney, and *Daniel W. Sullivan,* assistant district attorney; and the cause was argued orally by *Mr. Sullivan* and *Mr. Tibbs.*

Rosenberry, J. The complaint admittedly states a cause of action if the sale contemplated by the parties was by the acre, and does not state facts sufficient to constitute a cause of action if the sale was in gross.

It appears from the complaint that the negotiations were carried on by T. J. Pereles, now deceased. On May 18,

1912, he addressed to the board of supervisors of *Milwaukee County* the following communication:

"I hereby offer for sale to the county of *Milwaukee* the tract in the town of Granville, comprising about 203 acres of land, more or less, adjoining the new house of correction site on the north, for seventy thousand dollars ($70,000).

"This land is bounded on the south by the new house of correction site, on the west by the Chicago, Milwaukee & St. Paul Railway Co., and on the north, part of the distance, by the so-called Chicago-Northwestern Belt Line. About 120 acres, more or less, of the land lie west of the Hopkins road, and about 80 acres, more or less, lie east of said road.

"If you decide that you are interested only in the land west of the road, I will sell that portion west of the Hopkins road for forty-three thousand dollars ($43,000).

"The title to the land is free and clear of all incumbrances and a free and complete abstract of title will be furnished. This offer to remain open to you until the 1st day of July, 1912.

"I, however, reserve the right to demand and receive a higher price than that above quoted in case the land is procured by the county under condemnation or appraisal proceedings.

"A map of the land offered herewith is attached to my offer to the county board of supervisors under date of June 22, 1911."

It appears that at that time Mr. Pereles was the owner of a tract of land in the town of Granville comprising about 203 acres; that a part of the tract lay on the west side of the Hopkins road and a part on the east side. That portion lying on the west side of the Hopkins road embraced parts of four governmental subdivisions.

Apparently the negotiations proceeded and on May 24, 1912, Mr. Pereles wrote another letter to G. J. Riemer, chairman of the committee, house of correction, which was as follows:

"At your request I have submitted the proposition of the sale of the lands to *Milwaukee County* situated west of the

Hopkins road in the town of Granville to the parties in interest and after fully considering the same I have this proposition to make: In case the county purchases the said land I will sell the same for $325 per acre, cash, or will take $43,000 for all of said land which lies west of Hopkins road in bonds of *Milwaukee County.*"

On July 9, 1912, the committee to whom the communication of May 24th was addressed reported to the county board of supervisors as follows:

"Your joint committee on house of correction and treasury and taxes, to whom was referred the communication of T. J. Pereles, found on page 41 of the proceedings of this board, under date of May 21, 1912, and on pages 57 and 58 of said proceedings under date of June 4, 1912, relative to the purchase of certain lands therein referred to for the location and maintenance of the house of correction of *Milwaukee County,* beg leave to report: that we have personally investigated the necessity for this purchase, and also the character of the lands in question, and we find those lands hereinafter described, which lie west of the Hopkins road, and which contain about 120.749 acres, more or less, are necessary to be acquired for the location and maintenance of the house of correction of *Milwaukee County;* that said lands are especially adapted as a building site for the new buildings which are to be constructed; that said lands are also valuable and necessary for the employment of persons who may from time to time be confined in said house of correction; that we have investigated the value of lands and find that the price at which these lands are offered, namely, $325 per acre, is fair and reasonable.

The report further stated that Mr. Pereles was willing to accept in payment the sum of $14,233.40 in cash and give a land contract by the terms of which the remainder of the purchase price was to be paid in five equal annual instalments of $5,000 each.

The board of supervisors adopted the report and passed a resolution authorizing the chairman of the board and the county clerk to purchase the lands upon the terms specified

in the report, in which resolution the lands were described as follows:

"The north half (½) of the northwest quarter (¼) of the southeast quarter (¼) of section 26, town 8 north, range 21 east, excepting a triangular piece cut away from the southwest corner by Chicago, Milwaukee & St. Paul Railway Company and ground covered by track of said railroad, leaving about nineteen (19) acres, more or less.

"That part of the northeast quarter (¼) of the southwest quarter (¼) of section twenty-six (26), town 8 north, range twenty-one (21) east lying on the north side of said railroad and containing about one and forty hundredths (1.40) acres more or less.

"That part of the east half (½) of the northwest quarter (¼) of section 26, town 8 north, range 21 east, bounded and described as follows: Commencing at the southeast corner of said east half of the northwest quarter (¼) of said section, running thence north on the quarter-section line 25.82 chains; thence west on a line and parallel with the north and south line of said quarter-section 19.655 chains to a point; thence south 8.47 chains to the Milwaukee & La Crosse Railroad track; thence in a southeasterly direction along said railroad track to the south line of said east half (½) of said quarter-section; thence east along said south line 7.095 chains to place of beginning, containing 38.349 acres of land, more or less.

"All that part of the south half (S. ½) of the northeast quarter (¼) of section 26, town 8 north, range 21 east, which lies west of the so-called Hopkins road, as said road is now laid out and located, containing 62 acres of land, more or less."

The resolution contained the following recital:

"Whereas the county board of *Milwaukee County* has heretofore decided to relocate the house of correction of *Milwaukee County,* and did heretofore for that purpose purchase certain lands located in the town of Granville, *Milwaukee County,* known as the Zautcke and Reichert tracts; but the structure, buildings and equipment for said relocation have not as yet been erected or constructed; but such construction is contemplated in the near future; and

"Whereas, it now appears that it is necessary to secure other and additional lands for said relocation; and

"Whereas, the lands owned by T. J. Pereles, adjacent to said lands above referred to and hereinafter described and referred to, are necessary for and are especially valuable as a building site for said buildings so to be constructed and are necessary for the maintenance of said house of correction and for the employment of persons who may from time to time be confined therein; now, therefore, be it . . . ."

On July 19, 1912, Mr. Pereles and wife as vendors entered into a contract with the county of *Milwaukee* for the sale of the premises in accordance with the terms of the resolution adopted by the county board. In the land contract the premises were described as they were described in the resolution adopted by the county board, and the contract was in the usual form of such contracts; the clause which stated the consideration being as follows:

"That the said vendee [defendant] does hereby, for value received, promise and agree to pay or cause to be paid to the said vendor the sum of thirty-nine thousand two hundred thirty-three and 40/100 dollars ($39,233.40) in the manner following:" [Here are specified the amounts and dates of payment.]

"Said payments to apply as paid and when fully completed as the purchase money of the lands and premises hereinafter described."

At the time the land contract was executed a deed of the premises was also executed and delivered in escrow, the same to be finally passed when the last payment should be made.

Mr. Pereles died June 8, 1913; but before his death, upon a survey made by the defendant, it appeared that that part of the tract which was supposed to contain 62 acres in fact contained 70.282 acres; so that the total area of the tract was 129.031 acres instead of 120.749, and on September 3, 1912, Mr. Pereles filed with the county clerk a claim for $2,691.65, the same being for the excess acreage at the rate of $325 an acre. The claim was disallowed. Appeal was taken therefrom to the circuit court for Milwaukee county, where formal

pleadings were filed and the defendant's demurrer to the complaint was sustained.

Applying the law as stated by this court in *Docter v. Furch,* 76 Wis. 153, 44 N. W. 648, 826, we are of the opinion that the sale in the instant case is a sale in gross, and falls within the second class; that is, it is a sale of a tract in which, though a supposed quantity by estimation is mentioned in the contract, the reference is only for the purpose of description and the circumstances are such as to show that the parties intended to risk the contingency of quantity. *Hackbarth v. Wollner,* 88 Wis. 476, 60 N. W. 704. In this view of the case it is not necessary to determine what effect the words "more or less" as used in the correspondence and land contract have. Here the vendor intended to sell and the county intended to purchase all that part of the tract lying west of the Hopkins road and within the boundaries indicated, and that without reference to its exact acreage. There is no claim of fraud and the discrepancy is not so great as to indicate gross mistake.

By the Court.—Order affirmed.

CARL MILLER LUMBER COMPANY, Respondent, vs. ELFERS and others, imp., Appellants.

October 6—October 24, 1916.

Mechanics' liens: Notice of claim: Sufficiency: Statement of materials furnished.

1. **The right to a lien given by sec. 3315, Stats. 1911, was lost if the notice of claim of lien given pursuant to that section failed to comply with the statutory requirements.**
2. **A notice of claim of lien which recited that the claimant was a lumber dealer, but contained no statement as to what materials were furnished by it, was not a sufficient compliance with sec. 3315, Stats. 1911.**

Appeal from a judgment of the circuit court for Milwaukee county: J. C. Ludwig, Circuit Judge. *Reversed.*

The appeal is from a judgment of foreclosure of a mechanic's lien in favor of plaintiff and against the defendants.

The plaintiff and respondent, a corporation engaged in business as lumber dealers in the city of Milwaukee, Wisconsin, delivered to the defendant Alfred Hoffmeister, a contractor, certain lumber of the value of $948.67. The lumber was used by the contractor in the repairing and construction of a flat building and cottage on premises owned by the defendant *Mary Elfers.* Work on the building was commenced in June and completed in October, 1911. The last date of the delivery of the lumber was September 1, 1911. On July 24th the plaintiff signed and delivered to the defendant Hoffmeister a writing as follows:

"*To whom it may concern:* On receipt of eight hundred dollars, we, the undersigned, hereby waive all rights and claims of a mechanic's lien for lumber furnished to the order of A. Hoffmeister for the erection and construction of a certain two-story frame flat building situated on Holton street between Wright and Clarke street."

This was taken by the defendant Hoffmeister, delivered to the defendant *Elfers,* and a payment made by her to the contractor. Nothing was paid to the plaintiff at the time of the signing of this writing and no payments made to it on this account except two instalments of $100 each on July 29th and August 22d.

On October 19, 1911, the plaintiff served a notice of claim of lien upon the defendants, the substantial parts of which are as follows:

"*August Elfers and Mary Elfers, his wife.*

"Sir: You will please take notice that the undersigned, *Carl Miller Lumber Company,* a corporation . . . doing business in the city of Milwaukee, Wisconsin, as lumber dealers, has been employed by Alf. Hoffmeister, a contractor doing business in said city, for the following purpose, to wit:

for the erection and construction of a certain two-story frame flat building situated on the following described real estate in the county of Milwaukee, state of Wisconsin, to wit: [then follows description]; which said work was done for you and materials furnished on said property, under a certain contract entered into by and between you and said contractor, Alf. Hoffmeister, and such work and labor were performed and materials furnished on and between the 8th day of June, 1911, and the 1st day of September, 1911, both days inclusive, at and for the agreed price of $948.67, and which said work and labor and materials were actually used in, upon and for the erection and construction of said building, under said contract, between you and the said contractor, Alf. Hoffmeister.

"That the last day on which such work and labor were performed and materials furnished was on the 1st day of September, 1911; and that said contractor, Alf. Hoffmeister, is indebted to the undersigned for the performance of said work and labor and the delivery of said materials in the sum of nine hundred forty-eight 67/100 dollars, of which no part has been paid except July 29 by cash $100, August 22 by cash $100, leaving the amount of $748.67 and interest from October 19, 1911, due the undersigned, and that all of said work and labor was performed and materials furnished by the undersigned as subcontractor under said contractor, Alf. Hoffmeister.

"Wherefore the undersigned claims the benefit of the lien given and granted to us by chapter 143 of the Revised Statutes of 1878 of the state of Wisconsin, and the several acts amendatory thereof and pursuant to the law in such case made and provided, for the amount herein stated due the undersigned."

This amount being unpaid, suit was commenced against the parties hereto by the plaintiff and a copy of the notice was attached to and made a part of the complaint, a demurrer was interposed, and the question of the sufficiency of the notice was raised on that demurrer. The demurrer was overruled. More than a year elapsed from such proceeding before the trial and no appeal was taken therefrom. Upon the trial a

demurrer *ore tenus* was interposed to the complaint and overruled. Judgment was entered in favor of the plaintiff for the amount claimed, declaring the same to be a lien on the property of the defendant *Elfers,* from which judgment this appeal is taken.

O. W. Bow, for the appellants.

F. X. Boden, for the respondent.

Eschweiler, J. It is contended by defendants that the notice of claim of lien by the plaintiff was insufficient under the calls of the statute to give to it a right of lien, and that in any event the writing signed by the plaintiff on July 24th, set out at length in the statement of facts, should be considered a waiver of any rights the plaintiff may have had against the real estate of the defendant *Mary Elfers.*

Sec. 3315, Stats. 1911, which was in effect at the time the materials were furnished by the plaintiff, provided that such materialman or subcontractor should, within sixty days after doing the work or labor or furnishing the materials, give notice in writing setting forth that he has been employed by the principal contractor to perform or furnish and has performed or furnished work, labor, or material, with a statement of the labor performed or the materials furnished, the amount due therefor from such principal contractor, and that he claims a lien, etc.

The provision that now appears in the same section to the effect that in the event that any owner shall complain of the insufficiency of such notice the burden of proof shall be upon him to show that he has been misled or deceived by such insufficiency thereof, first appeared by ch. 213, Laws 1913. The construction, therefore, given to this notice must be upon the law as it stood in the Statutes of 1911. Under that statute the right of the lien was lost unless the notice contained the statutory requirements. *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 220, 94 N. W. 74.

In the notice before us there is no statement of what materials were furnished by plaintiff. The recital in the notice that plaintiff is a lumber dealer and the fact appearing in the evidence that lumber was furnished are not sufficient to make this a valid notice. *Chandler L. Co. v. Fehlau,* 137 Wis. 204, 208, 117 N. W. 1057.

There being a failure of proper notice, no judgment for lien could be entered. This disposition of the case makes it unnecessary to consider whether there was a waiver of lien by the writing of July 24, 1911.

By the Court.—Judgment reversed, with directions to dismiss the complaint.

COLUMBUS INSTITUTE OF MILWAUKEE, Respondent, vs. CONOHAN, Appellant.

October 6—October 24, 1916.

Corporations: Subscriptions for stock: Ambiguity: Payment in instalments: Calls, when unnecessary: Statute construed: False representations inducing subscription: Materiality: Ratification of contract: Trial: Reopening case: Harmless error.

1. A subscription for a certain number of "shares of the capital stock" of a corporation which issued both preferred and common stock cannot be held void for ambiguity or uncertainty where it appears that, at the time of signing, the subscriber knew that all of the common stock had been taken and that nothing but preferred remained.
2. In the absence of restrictions in its charter or the general law of the state, a corporation may accept and enforce stock subscriptions payable in instalments.
3. Sec. 1754, Stats., providing for the making of calls by directors, is intended to fix the time of payment of a general subscription which fixes no time therefor; and where the subscription contract fixes such time a call by the directors is unnecessary.
4. A representation, alleged to have been made to and relied upon by a subscriber for stock, that none but members of a certain fraternal order could buy stock or hold office in a corporation

formed for the purpose of erecting a clubhouse, is *held*, even if made and false, to have been in this case immaterial.

5. In such a case, payments on the subscription contract more than a year after it was made and after the subscriber had had ample opportunity to learn the facts, were a ratification of the contract.

6. The opening of a case after both parties had rested, for the purpose of admitting formal evidence which added nothing of substance to the case, was not a prejudicial error even though defendant's counsel was not present, no claim being made that there was anything in such evidence which he could have met or desired to meet by proof.

Appeal from a judgment of the circuit court for Milwaukee county: J. C. Ludwig, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court affirming a judgment of the civil court for the balance due upon two subscriptions to the capital stock of the plaintiff. The facts were these: The plaintiff is a domestic corporation organized in August, 1910, for the purpose of erecting and holding the title of a building in Milwaukee to be used as a clubhouse by the two local lodges of the Knights of Columbus, which is a fraternal order incorporated under the laws of Connecticut. The capital stock of the plaintiff corporation was originally fixed at 5,000 shares of $10 each, of which 4,000 shares were to be preferred stock and 1,000 common. About two years later the amount of preferred stock was increased to 11,500 shares. Before any preferred stock was offered for sale the entire issue of common stock was subscribed for and taken in equal shares by the two local councils of the order. This action was generally known by the members of the order and appears by the records of the two councils, the defendant being a member of one of such councils. The preferred stock was then offered for sale and the defendant signed a subscription paper by which he agreed to take ten shares "of the capital stock of the corporation" and pay $10 per share therefor in five equal annual payments of $2 per share, due at specified dates beginning October 1,

1910, and ending September 1, 1914. This subscription with others was formally accepted by the corporation September 15, 1910. The defendant paid the first instalment May 22, 1911, and the second October 14, 1911, but no more. In November, 1911, he subscribed for ten additional "shares of the capital stock," payable in like instalments as the first subscription, each instalment being, however, payable one year later. He paid nothing on this second subscription, but in April, 1913, he promised to pay the amount then due on both subscriptions.

The defendant claims (1) that the subscription contract was void because fatally ambiguous and uncertain in that it did not specify whether the stock subscribed for was common or preferred; (2) that a stock subscription contract payable in instalments is illegal and void; (3) that there can be no recovery because no call was made to pay the stock subscription; (4) that certain materially false representations as to the membership of the corporation were made on the faith of which he subscribed; and (5) that the judge of the civil court erred in opening the case after both parties had rested and taking further testimony on a subsequent day when defendant's counsel was not present.

For the appellant there was a brief by *W. H. Timlin, Jr.,* and *Patrick W. Dean,* and oral argument by *Mr. Timlin.*

Oliver L. O'Boyle, for the respondent.

WINSLOW, C. J. The defendant's contentions will be taken up in their order.

1. The contract of subscription might be held ambiguous if it were shown that the subscriber did not know that there were two kinds of stock, or did not know that all of the common stock had been taken and nothing but preferred stock remained to be sold. The facts are well nigh conclusive that the defendant was aware of the whole situation; he does not even intimate in his evidence that he was ignorant of it. He

was a member of the council which took half of the common stock. The trial judge concluded in effect that it was understood by both parties that the stock for which the defendant subscribed was preferred stock, and we think he was amply justified in so concluding. When both parties understand the words used in a contract to mean the same thing there can hardly be said to be any fatal ambiguity or uncertainty.

2. In the absence of restrictions in its charter or the general law of the state a corporation may accept and enforce stock subscriptions payable in instalments. 2 Clark & Marshall, Priv. Corp. pp. 1449, 1450.

3. There are no such restrictions in the charter of the plaintiff corporation and we find none in the general laws of the state. Sec. 1754, Stats., providing for the making of calls by directors, is intended to fix the time of payment of a general subscription which fixes no time for payment. It is to make that certain which before was uncertain. It is entirely unnecessary when the subscription contract fixes the time of payment. *Germania I. M. Co. v. King,* 94 Wis. 439, 69 N. W. 181.

4. The false representations relied on were that no one but Knights of Columbus could buy stock or hold office. It appears by the articles that all of the directors (twelve in number) must be Knights of Columbus. We can find no evidence in the case that any one but Knights of Columbus ever bought stock, held stock, or held office, nor does it appear how the representation, if made, was in any respect a substantial or material representation. Furthermore, the defendant doubtless ratified his contracts of subscription by making payments on the first contract more than a year after it was entered into, at which time he had had ample opportunity to ascertain the provisions of the articles of incorporation of a corporation of which he himself was a member.

5. After both parties had rested, the case was reopened for further testimony and some further testimony was taken in

presence of counsel for both parties. It was then suggested that certain corporate records should be introduced and that it might be done on the following day, but defendant's counsel stated that he would not be there on the following day (Saturday), whereupon a continuance was ordered until Monday. At this latter time defendant's counsel was not present and some formal record evidence was introduced, which added nothing of substance to the case. Counsel does not now suggest that there was anything in this testimony so taken which he could have met or desired to meet by proof. We find no substantial prejudicial error here.

There are no other contentions that deserve consideration.

By the Court.—Judgment affirmed.

ADAMS, Plaintiff in error, vs. THE STATE, Defendant in error.

October 6—October 24, 1916.

Criminal law: Abandonment and nonsupport of children: Evidence: Venue: Jurisdiction: Removal of children from father's residence: Instructions to jury: Harmless error.

1. Evidence *held* to sustain defendant's conviction, under sec. 4587c, Stats., of abandonment and wilful refusal to provide for the support of his minor children.
2. The place where the children were, not where the father was, during the period complained of, fixes the venue of a prosecution for nonsupport of children.
3. So *held*, where the information charged that on May 1, 1915, at Waukesha, defendant had deserted and refused to provide for the support of his children, and the evidence showed that on April 25, 1915, defendant's wife left their home in Racine and went with the children to Waukesha, and that defendant had neglected and refused to support the children while they were living at Racine as well as while they were living at Waukesha.
4. Such removal of the children by the wife to another county, whether with cause (as in this case) or without cause therefor, would not justify the father in refusing to support them.

5. In a prosecution for nonsupport of children, under sec. 4587c, Stats., evidence of neglect by the father before and after the time charged may be considered.
6. The mere irrelevancy, under the proof, of an instruction to the jury is not ground for reversal, if it was not prejudicial and the jury was not misled by it.

Error to review a judgment of the municipal court of Waukesha county: Milo Muckleston, Judge. *Affirmed.*

The plaintiff in error, hereinafter called defendant, was convicted in the municipal court of Waukesha county of the offense of abandonment of his minor children, aged six and four respectively, and was sentenced on the 10th day of March, 1916, to one year at hard labor in the state prison at Waupun. The case is here for review.

D. J. Hemlock, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

Kerwin, J. The information charged the defendant with wilfully and feloniously, on May 1, 1915, at the city of Waukesha, Waukesha county, Wisconsin, without lawful excuse, deserting and refusing to provide for the support and maintenance of his legitimate minor children under the age of sixteen years, viz. Hazel, aged six years, and Sheridan, aged four years, leaving them in destitute and necessitous circumstances.

It appears from the evidence that on the 25th day of April, 1915, the wife of defendant left her home in the city of Racine and went with her two children to Waukesha, Wisconsin. It further appears that for many months before the complainant left Racine defendant had furnished practically no support for his wife and children. The preliminary examination of defendant was had on July 23, 1915, and he was bound over to the September term of the municipal court.

The court also ordered that defendant be released on his own recognizance and that he pay $5 per week to his wife until the further order of the court, and that in default of payment the recognizance be forfeited and defendant confined in jail.

The trial of defendant was had in March, 1916, and it appears by the evidence that of the $5 weekly allowance ordered paid by the court at the preliminary examination in September, 1915, only $5 had been paid. And it further appeared that for eleven months before the trial nothing had been contributed to the support of defendant's wife and children by defendant, except $5 paid shortly after the preliminary examination and $1 sent by defendant to buy firecrackers for the children. The defendant spent his time largely in the saloons playing and jigging for drinks. His wife, the complainant here, took in washings to support herself and children. She left Racine after defendant told her to go to work for the support of the children and went to Waukesha, where the opportunity for supporting herself and children was better for reasons stated in her testimony.

We shall not further discuss the evidence. It is ample to support the conviction under the statute.

Sec. 4587*c*, Stats., provides in part: ". . . any person who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime, and, on conviction thereof, shall be punished by fine not exceeding five hundred dollars, or imprisonment in the state prison, . . ."

1. Error is assigned on the ground that no offense was committed in Waukesha county. The argument under this head is that if any offense was committed it was committed in Racine, not in Waukesha county, therefore the municipal court of Waukesha county had no jurisdiction.

We are satisfied that this contention cannot be sustained. The place where the children were, not where the father was, during the period complained of, fixes the venue of a prosecution for nonsupport of children. 29 Cyc. 1678; *State v. Peabody,* 25 R. I. 544, 56 Atl. 1028; *State v. Dvoracek,* 140 Iowa, 266, 118 N. W. 399; *Ware v. State,* 7 Ga. App. 797, 68 S. E. 443; *Cleveland v. State,* 7 Ga. App. 622, 67 S. E. 696; *Brown v. State,* 122 Ga. 568, 50 S. E. 378. The evidence clearly shows that defendant neglected and refused to support his children while they were living at Racine as well as while they were living at Waukesha. Complainant testified she left defendant after he told her to go to work for the support of her children, and that defendant was able to work, and that the children had nothing to live on except the earnings of their father and mother. It also appears that complainant and her children received aid from the city of Racine before leaving there and going to Waukesha.

2. It is contended under the second assignment of error that neither the complainant nor her children had at the time the prosecution was commenced a residence in Waukesha county, and that she left defendant without any adequate cause. The evidence, however, shows sufficient cause for the change of residence from Racine to Waukesha county, and moreover it shows that defendant did not support his wife and children at Racine before they moved to Waukesha county. It will also be observed that the charge here is for failure to support the children, and the removal of the minor children by the wife to another county, even without cause for such removal, would not justify the father in refusing to support them. *Beilfuss v. State,* 142 Wis. 665, 126 N. W. 33. This court has ruled in prosecutions under this statute that evidence of neglect by the father before and after the time charged may be considered. *Hopkins v. State,* 126 Wis. 104, 105 N. W. 223; *Firmeis v. State,* 61 Wis. 140, 20 N. W. 663.

3. Counsel for defendant complains of refusal to give an instruction asked to the effect that a wife who abandons her husband without legal justification forfeits her right to support for herself and infant children taken with her; and that in order to convict defendant the jury must find that the infant children had at the time complained of a legal residence in Waukesha county.

There was no prejudicial error in the refusal of this instruction. The court, however, did give the following instruction, which doubtless was too favorable to defendant:

"A wife who abandons her husband without legal justification thereby forfeits her right to support for herself and infant children taken with her, the husband being entitled to establish the domicile and residence; but in order to convict the defendant in this action, you must find that the children, Hazel Adams and Sheridan Adams, had at the time complained of a legal residence in Waukesha county, Wisconsin. But if a man fails to supply his wife with such necessities and comforts of life as are within his reach, and by cruelty compels her to leave him and seek shelter and protection elsewhere, such conduct constitutes an abandonment of her by him, as much as if he had deserted her and gone away himself."

4. Appellant also complains of the following instruction:

"When a husband and wife live separately by consent, and the wife becomes destitute or the children are in a destitute condition, to the husband's knowledge, and he thereafter, though of sufficient ability, refuses to provide for her and them, he has abandoned them in a destitute condition, within the statute punishing a husband for wilfully abandoning and neglecting to support his wife and children.

"Cruel treatment does not always consist of actual violence. There are words of false accusations or gross insult that inflict deeper anguish than physical injuries to the person, more enduring and lacerating to the wounded spirit of a gentle woman than actual violence to the person, though severe. Opprobrious insinuations used by a husband toward his wife are abusive treatment."

Under the proof made this instruction was not relevant and ought not to have been given. But we think it was not prejudicial and that the jury was not misled by it. *Pelton v. Spider Lake S. & L. Co.* 132 Wis. 219, 112 N. W. 29.

We are of opinion that no error was committed upon the trial which affected any substantial right of defendant, therefore under the provisions of sec. 3072*m*, Stats., the judgment below must be affirmed.

By the Court.—The judgment is affirmed.

STATE, Appellant, vs. LANGE CANNING COMPANY, Respondent.

April 15—November 14, 1916.

Master and servant: Female employees: Regulation of hours of labor: Statute construed: Constitutional law: Legislative power: Delegation to industrial commission.

1. Sec. 1728—2, Stats. 1915, which, until the industrial commission shall issue general or special orders on the subject, forbids the employment of any female "at day work [between 6 a. m. and 8 p. m.] more than ten hours in any one day, or more than fifty-five hours in any one week," or "at night work [between 8 p. m. and 6 a. m.] more than eight hours in any one night, or more than forty-eight hours in any one week," limits to ten hours the time during which women may be employed in any one calendar day, where the work is done partly before and partly after 8 p. m.
2. Sec. 1728—2, Stats. 1915, is construed as laying down the general rule that women shall not be permitted to work in any place for such a period of time as shall be prejudicial to their health, and authorizing the industrial commission upon investigation to determine as a fact what class or classes of employment are dangerous or prejudicial to the life, health, safety, or welfare of females, and to determine as a fact how long females may be engaged in the several classes of employment reasonably without danger or prejudice to the life, health, safety, or welfare of such females, and to establish by general orders such classification and the time which females may labor therein, so found. So construed and to that extent the statute does not attempt unlawfully to delegate legislative power to the commission, and is valid.

APPEAL from an order of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Action to recover forfeiture for violations of sec. 1728—2, Stats., regulating hours of employment of women. The complaint sets forth thirty causes of action, in each of which continuous employment of a woman by the defendant in a pea-canning factory at a gainful occupation for a continuous period of from fourteen hours to seventeen and one-half hours, exclusive of meal periods, part of which working period was before and part after 8 o'clock p. m., is charged. The statutory provisions material are as follows:

"Section 1728—2. No female shall be employed or permitted to work in any place of employment or at any employment for such period or periods of time during any day, night or week, as shall be dangerous or prejudicial to the life, health, safety or welfare of such female. It shall be the duty of the industrial commission and it shall have power, jurisdiction and authority to investigate, ascertain, determine and fix such reasonable classification, and to issue general or special orders fixing a period or periods of time, or hours of beginning and ending work during any day, night or week, which shall be necessary to protect the life, health, safety or welfare of any female, or to carry out the purposes of sections 1728—1 to 1728—4, inclusive, of the statutes. Such investigations, classifications and orders, and any action, proceeding or suit to set aside, vacate or amend any such order of said commission, or to enjoin the enforcement thereof, shall be made pursuant to the proceeding in sections 2394—41 to 2394—70, inclusive, of the statutes, which are hereby made a part hereof, so far as not inconsistent with the provisions of sections 1728—1, 1728—2, 1728—3, and 1728—4 of the statutes, and every order of the said commission shall have the same force and effect as the orders issued pursuant to said sections 2394—41 to 2394—70, inclusive, of the statutes, and the penalties therein shall apply to and be imposed for any violation of sections 1728—1, 1728—2, 1728—3 and 1728—4 of the statutes. Until such time as the industrial commission shall so investigate, ascertain, determine and fix, and shall issue general or special orders thereon, the periods of time specified in the attached schedule shall be deemed to be dan-

gerous or prejudicial to the life, health, safety or welfare of females.

"Schedule.

"At day work, more than ten hours in any one day, or more than fifty-five hours in any one week.

"At night work, more than eight hours in any one night, or more than forty-eight hours in any one week.

"Day work is work done between six o'clock a. m., and eight o'clock p. m., of the same day; provided that employment not more than one night in the week after eight o'clock p. m. shall not be considered night work.

"Night work is work done between eight o'clock p. m. and six o'clock a. m. of the following day.

"Less than one hour during each day or night for dinner or other meals."

Sub. (1) and (2) of sec. 1728—1 are as follows:

"(1) The term 'place of employment' shall mean and include any manufactory, mechanical or mercantile establishment, laundry, restaurant, confectionery store, or telegraph or telephone office or exchange, or any express or transportation establishment.

"(2) The term 'employment' shall mean and include any trade, occupation or process of manufacture, or any method of carrying on such trade or occupation in which any female may be engaged, or for any place of employment, as herein defined."

Omitting the formal allegations of the first cause of action, the material part thereof is as follows:

"That on the 26th and 27th days of July, 1915, the defendant employed, permitted, and suffered to work in said canning factory at a gainful occupation, *i. e.* doing work and labor connected with the preserving and canning of peas and incident thereto, for hire or wages, for a continuous period of fourteen hours, exclusive of meal periods, one Mrs. J. Bauers, a woman, as follows: from 9:30 a. m. to 12 m. on July 26th, and from 1 p. m. July 26th to 12:30 a. m. July 27th, contrary to the provisions of sec. 1728—2 of the Wisconsin Statutes."

The other causes of action are the same excepting as to persons and time of employment. The defendant demurred to the complaint, and the demurrer was sustained on the theory that the period of work described in the complaint, a part being before 8 o'clock p. m. and a part after that hour, is not defined in the statute as either night work or day work; that the statute should be construed as prohibiting the employment of women more than ten hours in any one day at day work, as defined, and more than eight hours in any one night at night work, but that no limitation as to time is declared by the statute when part of the work is performed before 8 o'clock p. m. and part of the work is performed after that hour in any one calendar day. From the order sustaining the demurrer the *State* brings this appeal.

For the appellant there was a brief by the *Attorney General, J. F. Baker,* assistant attorney general, and *Fred Arnold,* district attorney of Eau Claire county; and the cause was argued orally by the *Attorney General.*

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

The following opinions were filed May 2, 1916:

ROSENBERRY, J. Three questions are presented for determination upon this appeal:

(1) Does the statute limit the number of hours women may be employed in any one calendar day where the work is done partly before and partly after 8 o'clock p. m. of that day?

(2) Is the statute void for the reason that it unlawfully delegates legislative power to the industrial commission?

(3) If it is held that the provision delegating certain powers to the industrial commission is unconstitutional and therefore void, can the remainder of the act stand as a valid enactment?

1. It seems to us clear that the legislature intended to fix the maximum period of time during which a female might work in any one day at ten hours and in any one week at fifty-five hours. The statute specifically provides that where all of the work is done between the hours of 8 o'clock p. m. on one day and 6 o'clock a. m. of the following day, it shall be denominated night work and shall not exceed eight hours. The legislature has not stated in express terms what the limitation should be where the work is performed partly before 8 o'clock p. m. and partly thereafter in the same day. Had this matter been brought to its attention it might have prescribed a still different limitation, but, having failed to make such specific limitation, there is no doubt in our minds that the amount of work which may be done in any one day, meaning thereby the period from midnight to midnight, is limited to ten hours. The complaint therefore states a cause of action.

So construed, the law is reasonable and the intent of the legislature is given effect. Construed in accordance with the contention of the defendants, it would permit a female to work fourteen or more hours in one calendar day. Such a construction would be subversive of the purpose of the law and would lead to the absurd result of permitting women to work more hours per day when the service is rendered partly in the nighttime than would be permitted if the work were all done in the daytime, and that in the face of a declaration by the legislature that night work is more detrimental to the health of women than day work. Such a construction should be avoided. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 150 N. W. 542.

2. Is the law void in so far as it attempts to delegate to the industrial commission power to "investigate, ascertain, determine and fix such reasonable classification, and to issue general or special orders fixing a period or periods of time, or hours of beginning and ending work during any day, night or week, which shall be necessary to protect the life, health,

safety or welfare of any female, or to carry out the purposes of sections 1728—1 to 1728—4, inclusive, of the statutes?"

It has been said by Chief Justice JOHN MARSHALL that

"The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck,* 6 Cranch (10 U. S.) 87, 128.

This principle, enunciated early in the development of the constitutional law of this country, has been repeatedly recognized, affirmed, and acted upon by this court. *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 549, 90 N. W. 1098; *State ex rel. Hessey v. Daniels,* 143 Wis. 649, 653, 128 N. W. 565; *State v. Redmon,* 134 Wis. 89, 112, 114 N. W. 137. We approach this question with a full appreciation of the duties, responsibilities, and obligations of the court in the premises.

"The legislative power shall be vested in a senate and assembly." Sec. 1, art. IV, Const.

It is a principle of elementary law that "under our constitutional form of government the legislature cannot delegate legislative powers to any officer or to any body of persons, individual or corporate, aside from the power to confer local legislative and administrative powers on county boards and municipal corporations." *State ex rel. Carey v. Ballard,* 158 Wis. 251, 257, 148 N. W. 1090.

The exercise of the police power of the state for the protection of women and children by prescribing the hours in which they may work in certain occupations, the conditions under

which their work shall be performed, and providing numerous other details for their welfare, is purely a legislative function, and a legislative enactment in the exercise of that power should be given full force and effect. Over thirty states have adopted legislation upon this general subject. Many of these enactments in the early history of legislation of this class were challenged as unconstitutional. That the legislature may, however, within constitutional limits, enact such a law is now placed beyond debate. Improvements in methods of transportation, the invention of machinery, and improved methods of communication, have resulted in the removal from the home, the farm, and the small shop of many activities which come very close to the life of the people. The work is now done in factories in great centers of population under conditions which may be and often are prejudicial to the health and welfare of those engaged in such occupations, hence the necessity of legislative regulation. Speaking of the great changes which have taken place since the adoption of the constitution of the United States and of the spirit in which they should be met by the courts, the United States supreme court said:

"They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with in-

creasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise." *Holden v. Hardy,* 169 U. S. 366, 387, 18 Sup. Ct. 383.

What is true of the constitution of the United States is true of the constitution of the state of Wisconsin, except perhaps that the latter may be more easily amended. It is as true of one as of the other, they should be so construed, as far as possible, as to effectuate rather than to defeat the will of the people as expressed in legislative enactment.

The thing which is vested by our constitution in the senate and assembly and which cannot be delegated is "legislative power," a term more easily understood than defined. A simple definition is that it is the power to make laws. *In re Appointment of Revisor,* 141 Wis. 592, 598, 124 N. W. 670. Law is defined as "the aggregate of those rules and principles of conduct which the governing power in a community recognizes as those which it will enforce or sanction, and according to which it will regulate, limit, or protect the conduct of its members." Bouv. Law Dict. The power, then, which is vested in the senate and assembly and which cannot be delegated is the power to declare what rules and principles of conduct shall govern the citizens of this state and which shall be enforced and according to which the conduct of citizens of this state is to be regulated, limited, or protected. The provision delegating to the industrial commission the power to fix "reasonable classification, and to issue general or special orders fixing a period or periods of time, or hours of beginning and ending work . . . which shall be necessary to protect the life, health, safety or welfare of any female," is manifestly an attempt to delegate to the industrial commission the power and authority to declare those rules and principles of conduct which shall be enforced in this state as regulating or limiting the conduct of the citizens thereof in relation to the

employment of women and protecting women employed in certain occupations.

All occupations are not prejudicial to the health and welfare of women. The power to declare what classes of occupations are so prejudicial is vested in the legislature. Even those occupations which admittedly are inherently detrimental to the health of women may not be so if conducted under certain prescribed conditions or if the hours of employment are sufficiently limited. It is the duty and function of the legislature to declare in a general way under what conditions women shall be allowed to labor and to fix the limitation as to the hours during which they may be required to perform labor. This duty it cannot delegate.

The rule forbidding the delegation of legislative power is based upon experience and is vital to the maintenance of the integrity of our system of government. *Field v. Clark,* 143 U. S. 649, 692, 12 Sup. Ct. 495. The practical result of a delegation of legislative power is to remove the specific constitutional restrictions thrown about the exercise of that power. This is strongly illustrated by the orders attempted to be issued by the industrial commission under this statute, which are in part as follows:

"Order No. 1.

"In pea-canning factories where the laws regarding safety and sanitation and the orders of the industrial commission issued thereunder are complied with and where due provision has been made for handling the crop, women employees may be employed not to exceed ten hours each day between the beginning and ending of work, exclusive of meal times."

"Order No. 2.

"During the rush season, when abnormal conditions prevail by reason of breakdowns, bad weather, or climatic changes, women who are engaged in the process of canning only, may be employed not to exceed twelve hours each day from beginning to ending of work, exclusive of meal times, provided that such twelve-hour days shall be limited to fifteen

in any one year; and provided further that time-and-a-half pay shall be given for all time worked over ten hours a day. A day shall be considered to be the period from beginning to ending of work in any twenty-four hours."

Attention is called to order No. 2. Are the provisions of this order in the interest of women employees or in the interest of their employers? Does the amount of wages a woman receives for doing certain specified work determine whether or not the work is detrimental to her health? Is it in the interest of the public to permit women to work under unhealthful conditions for high wages? The power granted by the statute to issue general orders "to protect the life, health, safety and welfare of any female" is here exercised to prolong the hours during which a female may be required to work and in the interest of her employer and not in her interest. Then, too, what would a special order "to protect the life, health, safety and welfare of any female" be? Is it supposed that the commission should determine what hours a particular female should be allowed to work for a designated employer at a designated task? This is a thing the legislature itself could not do.

Having under consideration the validity of a statute providing that "it shall be unlawful and presumptively injurious to persons and property to drive piles . . . in Rock river, within the limits of the county of Rock," this court said:

"This statute is discriminating and class legislation, in violation of the spirit of our constitution, and contrary to the principles of civil liberty and natural justice. It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances, and subjects one class to losses, damages, suits, or actions from which all others, under like circumstances, are exempted. . . . Its operation is restricted and partial to that part of Rock river within the county of Rock, while said river elsewhere and all other rivers are excluded. . . . It would be difficult, if not impossible, to crowd into so short a statute any

more or greater violations of that principle, so essential to a free government, of 'equal, general, and standing laws.' For these reasons this statute is unconstitutional and void." *Janesville v. Carpenter,* 77 Wis. 288, 302, 303, 46 N. W. 128. See *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 434, 87 N. W. 561.

However, the requirement that laws shall be general in their application does not prevent classification, and a law is said to be general when it applies to all persons of a specified class in the same manner and to the same extent.

"It cannot be denied but that our constitutions, state and federal, are calculated to secure equal protection to all persons, subject to the rules of just classification. When by statute a person, natural or artificial, is denied an equal remedy in the law or equal protection in the courts such statute is void. . . . To this broad rule of equality of all persons before the law is the exception of the right under certain circumstances of proper classification, but this classification must be reasonable and based upon certain rules which bear a just relation to the act in respect to which the classification is made." *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 157, 113 N. W. 456.

"While it is true that the necessity and propriety of classification are primarily legislative questions, it is also true that the legislature must keep within the limits of constitutional bounds." *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 159, 113 N. W. 456, citing with approval the rule laid down by the supreme court of Minnesota as follows:

"The true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." *Nichols v. Walter,* 37 Minn. 264, 272, 33 N. W. 800.

If the people of this state desire to have vested in some constituted authority the power to so minutely regulate their affairs as to prescribe the conditions under which any female may be employed in certain occupations, making as a part of

the condition the amount of wage which she shall receive, they should proceed in an orderly manner to vest such power in such body by amendment to the constitution in the manner provided therefor.

The industrial commission or other designated governmental agency may properly be charged with the performance of many duties and the exercise of many powers in relation to the subject matter of this statute. It is impossible to set exact limits or to specify in detail in advance the duties and powers that may be so delegated and vested. Observing the spirit as well as the letter of the decisions of this court, there should be little difficulty from a practical standpoint in keeping within the limits of constitutional restraint. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905; *State ex rel. Buell v. Frear,* 146 Wis. 291, 131 N. W. 832, and other cases already referred to, deal exhaustively and authoritatively with this matter.

In *State ex rel. Buell v. Frear, supra,* speaking of the authority conferred upon the civil service commission, the court said:

"The authority thus conferred invests the commission with no arbitrary and uncontrolled discretion, but directs them to ascertain the facts and to apply the rules of law thereto under the prescribed terms and conditions. Such action is not legislative in character, but is the performance of an executive and ministerial duty within the regulations provided in the act. . . .

"No provision of the act, directly or by implication, authorizes any rule to be made that can add to or in any way alter or amend the regulations made by the law. Only such rules are authorized as serve to provide the details for the execution of the provisions of the law in its actual administration, to fix the way in which the requirements of the statute are to be met, and to secure obedience to its mandates." Pages 305, 306.

The general principle could not perhaps be stated in more apt and appropriate language. We conclude that the pro-

vision attempting to delegate certain powers to the industrial commission is void.

3. The question then arises, May the remainder of the statute stand as a valid enactment? It is clear that the legislature intended to limit the hours which women might be employed in the occupations specified, and that such regulations as are prescribed are by the express terms of the statute to remain in force for some considerable length of time. There is no reason to suppose that the legislature would not have adopted the statute as it stands without the provision hereby declared to be void as in violation of the constitution. The law is complete as it stands, and the void provision does not seem to have been the inducement for the enactment of the remainder of the law. *State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090; *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 229, 150 N. W. 542.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

WINSLOW, C. J. (*concurring in the result*). I agree that the statute limits the hours of work to ten hours when the work is done partly before and partly after 8 o'clock p. m. and hence that the demurrer to the complaint was properly overruled.

The question of the validity of those portions of the statute authorizing the industrial commission to make general or special orders is not necessarily involved in the case, and I withhold my assent to that part of the opinion which holds such provisions void as unlawful delegations of legislative power. When that question is essential to the decision of a case I shall wish to give it more careful examination than I am able to give it now.

The respondent moved for a rehearing.

In support of the motion there was a brief by *Sturdevant & Farr.*

Briefs upon the motion were also filed by the *Attorney General;* by *Quarles, Spence & Quarles, amici curiæ,* with *J. E. Dodge* and *I. A. Fish,* of counsel; by *Crownhart & Wylie, amici curiæ,* in behalf of the Wisconsin Federation of Labor, the Consumers' League, and the Wisconsin Pea Canners' Association; by *James T. Drought, amicus curiæ,* counsel for the Shoe Manufacturers Association of Milwaukee; and by *Lawrence A. Olwell* and *Bernard V. Brady, amici curiæ,* counsel for the Wisconsin State Laundrymen's Association.

The following opinion was filed November 14, 1916:

ROSENBERRY, J. Since the opinion in this case was filed the matter has been fully reargued by brief, and upon further study and reflection we are of the opinion that the statute may properly be construed as laying down the general rule that women shall not be permitted to work in any place for such a period of time as shall be prejudicial to their health and authorizing the industrial commission upon investigation to determine as a fact what class or classes of employment are dangerous or prejudicial to the life, health, safety, or welfare of females, and to determine as a fact how long females may be engaged in the several classes of employment reasonably without danger or prejudice to the life, health, safety, or welfare of such females, and to establish by general orders such classification and the time which females may labor therein, so found; and we are of the opinion that as so construed and to that extent the law should be upheld, for the reason that

"The authority thus conferred invests the commission with no arbitrary and uncontrolled discretion, but directs them to ascertain the facts and to apply the rules of law thereto under the prescribed terms and conditions. Such action is not legislative in character, but is the performance of an executive and ministerial duty within the regulations provided in the act." *State ex rel. Buell v. Frear,* 146 Wis. 291, 305, 306, 131 N. W. 832.

So much of our former opinion as is inconsistent with the views here expressed is withdrawn. We shall not attempt at this time to mark the boundaries of the commission's authority under the act as here construed, no order of the commission being before us in this action, but determination of that matter will be postponed until the action of the commission is in some way directly called in question. The modification of our views results in no modification of the mandate.

By the Court.—The motion for a rehearing is denied, without costs.

ESCHWEILER, J., took no part.

EBERLEIN, Respondent, vs. FIDELITY & DEPOSIT COMPANY OF MARYLAND, Appellant.

September 12—November 14, 1916.

Bankruptcy: Claims: Trustee's title to property: Indemnity insurance: Employer's liability: Privity between insurer and employee: Condition precedent to liability: Payment of loss by assured.

1. An unliquidated tort claim against an employer for injuries to an employee, not reduced to judgment until after the employer had been adjudged a bankrupt, was not a debt provable in the bankruptcy proceedings, and the trustee in bankruptcy took no title to an indemnity policy insuring the employer against loss from the liability imposed by law on account of such injuries.
2. A policy by which the insurer agrees to indemnify an employer against loss from the liability imposed by law on account of injuries to his employees, and providing that no action shall be brought under it unless brought by the assured for a loss actually sustained by his payment in money of a final judgment rendered in a suit against him, is a contract to indemnify the assured alone, and there is no privity of contract between the insurer and an injured employee.
3. Payment of the loss by the assured is a condition precedent to his right to maintain an action on such a policy. [Whether under the provision above stated a payment otherwise than in money would satisfy the condition, is not decided.]

4. After a judgment had been rendered against the assured in favor of an injured employee, the assured, being then bankrupt and without funds, obtained from a bank money to the amount of such judgment, the bank taking the note of the assured, indorsed by the attorney for the employee. The money was handed to said attorney, who gave the assured a satisfaction of the judgment but retained the money as security for his indorsement, it being agreed that the employee was not to receive any of it unless the attorney should be successful in collecting the insurance, the claim for which, under the policy, was assigned to him. *Held*, that such transaction did not constitute a payment of the loss by the assured such as would give a right of action on the policy.

APPEAL from a judgment of the circuit court for Forest county: W. B. QUINLAN, Circuit Judge. *Reversed.*

This is an action to recover upon a policy of insurance issued March 15, 1912, by the defendant to the Wisconsin Fruit Package Company to indemnify it from loss resulting from injuries to its employees. By the terms of the policy the defendant agreed to indemnify "the assured against loss from the liability imposed by law . . . on account of bodily injuries or death" suffered by employees as the result of the negligence of the assured, and contained a clause providing that no action should be brought under it unless after a final judgment rendered in a suit by the employee and within two years from the date of the judgment "for a loss that the assured has actually sustained by the assured's *payment in money*" of a final judgment rendered after trial in an action against the assured for damages on account of the negligence of the assured.

The action was tried by the court and the facts were not in dispute.

An employee of the assured named Castonguay received an injury while at work and brought action therefor against the assured, of which action the defendant took entire charge. After said action was commenced and on November 22, 1913, an involuntary petition in bankruptcy was filed against the

assured, an adjudication of bankruptcy followed on December 8, 1913, and a trustee was appointed and qualified. The assets were scheduled at $26,025.67 and the liabilities at $65,558.22, of which $20,918.04 were either secured or priority claims.

A verdict of $1,500 was rendered against the assured in the Castonguay action September 18, 1913, upon which judgment was not rendered until January 31, 1914. In March, 1914, all the property of the bankrupt was sold by the trustee to one Fish. The business of the bankrupt ceased upon its bankruptcy. In November, 1914, a meeting of the stockholders of the bankrupt corporation was held and a board of directors elected, which board held a meeting in December, 1914, and passed a resolution reciting the rendition of the Castonguay judgment and authorizing the treasurer of the corporation to take steps to secure funds to pay the judgment and to assign as security for the loan any property or rights which the corporation might have. The regularity and validity of this meeting is attacked by the appellant, but in the view taken by the court of the case it is not necessary to consider the question. In April, 1915, the treasurer of the corporation, Mr. E. A. Schmidt, went with the plaintiff (who was the plaintiff's attorney in the Castonguay action) to the German American National Bank of Shawano. Schmidt gave to the bank the note of the company, indorsed by himself and *Mr. Eberlein,* for the amount of the Castonguay judgment, the cashier handed the money to Mr. Schmidt, who handed it to *Mr. Eberlein,* who at once delivered a satisfaction of the Castonguay judgment to Schmidt and deposited the whole sum in the same bank to his own credit by virtue of an agreement with Castonguay that he (*Eberlein*) was to retain the money to secure his indorsement of the note and that Castonguay was not to receive any of it unless *Eberlein* was successful in the present action.

It was understood at the time that the bankrupt had no funds; that *Eberlein* was the responsible man to whom the

bank would have to look for its pay; and that suit was to be brought against the defendant on the policy and when the amount was collected in that suit it was to be used to pay the note. On the same day the corporation assigned to *Eberlein* any claim it might have under this policy, and *Eberlein* thereafter brought this action.

The circuit court concluded that there was no fraud in the transaction and rendered judgment against the defendant for the amount of the Castonguay judgment and interest. The defendant appeals from that judgment.

For the appellant there was a brief by *Williams & Stern*, and oral argument by *Burdette F. Williams*.

For the respondent there was a brief by *Eberlein & Larson*, and oral argument by *Albert S. Larson*.

The following opinion was filed October 3, 1916:

WINSLOW, C. J. The claim of Castonguay was purely a tort claim, unliquidated, not reduced to judgment until after the adjudication in bankruptcy, and hence not a debt provable in the bankruptcy proceedings. *In re Crescent L. Co.* 154 Fed. 724; *Dunbar v. Dunbar*, 190 U. S. 340, 350, 23 Sup. Ct. 757. It follows, necessarily, that the title to the insurance policy did not pass to the trustee in bankruptcy, but remained with the bankrupt to indemnify it against loss. The bankrupt proceedings may therefore be dismissed from consideration.

It is settled in this state, in accord with the weight of authority elsewhere, that a policy of insurance like the one before us is a contract to indemnify the assured alone; that there is no privity of contract between the insurer and the injured employee; and that payment of the loss by the assured is a condition precedent to the right to maintain an action on the policy by the assured. *Stenbom v. Brown-Corliss E. Co.* 137 Wis. 564, 119 N. W. 308, and cases cited in the opinion in that case.

In the *Stenbom Case* it was also held that, under a policy

which contracted to reimburse the assured for a loss "actually sustained and paid" by him, the payment may be made otherwise than in money, provided the same is made and accepted in good faith and there is a *bona fide* settlement and satisfaction of the judgment secured by the injured employee. In the present case the condition of the policy provides that there must be "payment in money" by the assured before there arises liability upon the policy. It may well be that this provision would logically take the case out of the last-named rule. We do not find it necessary, however, to decide that question.

Assuming that the words used in the present policy are no stronger in legal effect than those used in the *Stenbom* policy, we are well convinced that there was no payment shown here. True, the corporation gave an absolute note to the bank which *Eberlein* indorsed, and the money was secured on that note. Had *Mr. Eberlein* turned that money over to Castonguay and been content to look to the defendant's contract for his protection, a very different question would have been presented.

But the money has never been used to pay the judgment, and never will be unless there is a recovery in this action first. This exactly reverses the terms of the defendant's contract. That contract is to pay the assured what the assured has first been compelled to pay to the injured person. The arrangement now to be substituted provides for paying the injured person what the insurance company has first been compelled to pay to the assured. To say that the assured has actually paid a judgment when the money has merely been secured from the bank on a note and never has reached the judgment creditor, but is held by an indorser of the note as security for his indorsement and is to be turned over to the bank at once in case of failure in the present action, is to make substance out of shadow.

The case principally relied on by the respondent is the case of *Herbo-Phosa Co. v. Philadelphia C. Co.* 34 R. I. 567, 84 Atl. 1093. While there are some similarities in the two cases

there are also very substantial differences, and we cannot consider it as controlling or even as very persuasive as applied to the facts before us.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the defendant dismissing the complaint.

The respondent moved for a rehearing and for a modification of the mandate.

In support of the motion there was a brief by *J. A. Walsh & Eberlein & Larson,* attorneys, and in opposition thereto a brief by *Williams & Stern,* attorneys for the appellant.

The motion was denied, with $25 costs, on November 14, 1916.

ILLINOIS STEEL COMPANY, Appellant, vs. MUZA and others, Respondents.

September 13—November 14, 1916.

Ejectment: Location of premises: Adverse possession: Evidence: Testimony of deceased or absent witness: Statute construed. "Other action or proceeding."

1. In an action of ejectment the location of the premises and their situation with reference to the property involved in a previous action of ejectment by the same plaintiff are *held* to have been sufficiently shown by the evidence and the statements made to the trial court by counsel for both parties.
2. The "other action or proceeding," in which, under sec. 4141*a*, Stats., the testimony of a deceased witness or a witness who is absent from the state is admissible, is not limited to actions or proceedings in which the parties are the same as in the action wherein the testimony was originally taken, it being sufficient that the party against whom such testimony is offered had a full and adequate opportunity to cross-examine the witness on substantially the same issue and then had the same interest and motive to cross-examine that he has on the pending trial. *Pfeif-*

fer v. Chicago & M. E. R. Co. 163 Wis. 317, so far as it conflicts herewith, overruled.

3. So *held* in an action of ejectment as to testimony of a witness, since deceased, which had been taken in a previous action of ejectment by the same plaintiff against another defendant,—such witness, who was the predecessor of both defendants in the occupancy of a tract which included the separate parcels involved in the two actions, having testified as to his adverse possession of the whole of such tract.

APPEAL from a part of a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an action in ejectment.

The plaintiff is the holder of the record or paper title to the property in dispute. The defendants pleaded adverse possession under the ten- and twenty-year statutes. At the opening of the defense, W. J. Buckley, the official stenographer and court reporter of Judge LUDWIG's branch of the circuit court for Milwaukee county, was called as a witness and was asked to read the original notes taken by him of the testimony of Jacob Muza and others, now deceased, during the trial of an action in which the *Illinois Steel Company* was plaintiff and Anton Zelin and others were defendants. The land involved in the Zelin case lies to the north of the land involved in the present case. The circuit court admitted that portion of Muza's testimony as given in the Zelin case which tended to show adverse possession of the premises involved in this action by Jacob Muza and others. Plaintiff took exception to the admission of such testimony.

The court submitted the question of adverse possession to the jury in a special verdict, who found for the defendants. Judgment was entered in favor of the plaintiff for the easterly six feet of the premises as described in the amended complaint and in favor of the defendants as owners in fee simple of all the remainder of the property here involved. This appeal is taken from that part of the judgment in favor of the defendants.

The cause was submitted for the appellant on the briefs of *Theodore Kronshage, Jr.*, and *John H. Paul*, and for the respondents on that of *Moritz Wittig* and *H. J. Killilea*.

SIEBECKER, J. It is urged that the record does not disclose where the property here in dispute is located on Jones Island nor its location with reference to the location of the Anton Zelin property. It is shown that the defendants' property lies in Cooper street between blocks 190 and 191 of the plat introduced in evidence exhibiting the platted area of Jones Island. On record pages 366 and 367 it appears that, in response to the court's inquiry regarding the location of the property in litigation here in relation to the Anton Zelin property, plaintiff's counsel stated to the court that it was not denied ". . . that it lies south and a little to the west of the Zelin property, but the situation is just this: that there is no testimony in this Zelin case which was given with reference to any other case except the Zelin case." "Court: Yes. There was testimony of occupation of more land around it." It was also admitted that a strip, a few feet wide, lay between the Anton Zelin property and the property in litigation. We are satisfied from the record that the property in litigation and the Anton Zelin property were sufficiently identified and that the location of them on the island was properly assumed by the circuit court to be in conformity to the representations of counsel of both parties.

The principal question on this appeal relates to the competency of testimony given by witnesses, now deceased, on the trial of the case of Illinois Steel Co. v. Anton Zelin in the circuit court for Milwaukee county in 1907. This testimony tended to show the use and occupation of some particular pieces of land there in dispute and of some other portions of Jones Island, from a time prior to 1880 and thereafter, and that such occupancy was adverse and continuous to the time of such trial. The trial court overruled plaintiff's objection

to such testimony and held that the testimony is material and competent evidence in this case. The trial court based its ruling on the general rule of evidence established in the common law and the statutory declaration on the subject as contained in sec. 4141*a*, Stats., which provides:

"The testimony of any deceased witness, or any witness who is absent from the state, taken in any action or proceeding, except in a default action or proceeding where service of process was obtained by publication, shall be admissible in evidence in any retrial, other action, or proceeding where the party against whom it is offered shall have had an opportunity to cross-examine the said deceased or absent witness, and where the issue upon which it is offered is substantially the same."

This court in the early case of *Charlesworth v. Tinker*, 18 Wis. 633, applied this common-law rule of evidence in a broad and liberal way. There the evidence of a deceased witness given by him in a criminal action for an assault and battery was held admissible in a subsequent civil action by the complaining witness in the criminal action to recover damages for the assault from the party who was prosecuted criminally. The trial court had excluded the evidence as incompetent and on appeal this court declared:

"It is claimed that this evidence was properly excluded, because the testimony of the deceased witness was not given in a judicial proceeding in which the plaintiffs in this case were parties, and where they had the power to cross-examine the witness. It seems, however, to be well settled by many of the authorities, *that it is not necessary, in order to admit such testimony, that it should have been given on the trial of a cause in the exact technical shape of the second action, or that the parties in this action should be literally or nominally the same with those on the trial of the first action.*" (Citing.) "It appears to us that the true test in regard to the admissibility of such evidence is, *Did the party who is to be affected by it have the power of cross-examining the witness, or at least have an opportunity of doing so?* If the party had this power of cross-examining the witness on the former trial,

and was legally called upon to do so, we can then see no danger or hardship in admitting the evidence in a subsequent suit after the decease of the witness."

This case was cited approvingly in *McGeoch v. Carlson,* 96 Wis. 138, 71 N. W. 116. This court, in the recent case of *Pfeiffer v. Chicago & M. E. R. Co.* 163 Wis. 317, 156 N. W. 952, in considering sec. 4141*a,* Stats., determined that the phrase "in any retrial, other action, or proceeding" in which the testimony of a deceased witness or one absent from the state is admissible was intended by the legislature to be "limited to retrial of the same action or 'other action or proceeding' *involving the same issues and between the same parties.*" In arriving at this conclusion it was there observed:

"We find nothing in the statute extending its operation to actions or proceedings between other parties than those in which the original and sworn testimony was first given. On the other hand, we find the restriction to actions or proceedings between the same parties in the common law which preceded the statute, in the group of words 'any retrial, other action, or proceeding,' and in the rule of law which forbids us to extend by any latitudinarian construction the words of this statute to causes not expressly or by necessary implication included therein."

Obviously the statute was there considered as declaratory only of an existing general rule of evidence. Upon re-examination of the statute and of the *Tinker Case,* 18 Wis. 633, which was cited to our attention on the motion for rehearing in the *Pfeiffer Case,* we are convinced that we misconceived the legislative purpose of this act and interpreted the terms of the statute in too restricted a sense. Upon re-examination of the subject and further study of the terms of the statute in the light of the liberal application of the established rule in the *Tinker Case,* we are convinced that it was intended to carry the doctrine of that case to the logical conclusion of making the testimony of a deceased witness or one absent from the state, "taken in any action or proceeding, . . . ad-

missible in evidence *in any retrial, other action, or proceeding,* where the party against whom it is offered *shall have had an opportunity to cross-examine* the said deceased or absent witness, and where the issue upon which it is offered *is substantially the same,"* competent in all actions wherein the adverse party objecting to such testimony had the opportunity of a full and adequate cross-examination of the witness and where such party has the same interest and motive in his cross-examination in the pending trial as he had in the action or proceeding wherein the testimony was taken. Such a practice renders it unimportant as to whether the action or proceeding wherein such testimony is sought to be used is a retrial of the same action or proceeding or is another action or proceeding *between the same or different parties.* The essential thing is that the issue upon which such testimony is offered is substantially the same and that the objecting party shall have had an opportunity of a full and adequate cross-examination and had the interest and motive to exercise this right that he has on the pending trial. Whenever the competency of such testimony arises it necessarily involves the inquiry whether or not the objecting party has had such full and adequate opportunity to cross-examine the witness on substantially the same issues and whether he then had the same interest and motive to cross-examine the witness as he has on the pending trial, which determination must necessarily rest with the trial court. We are now convinced that we erred in construing this statute in the *Pfeiffer Case* by holding that such testimony is admissible only "in any retrial, other action, or proceeding involving the same issues and between the same parties," but that the terms "retrial, other action, or proceeding" were intended to include actions and proceedings by any person against the same party wherein the issues were substantially the same as in the action or proceeding in which the testimony was given. We deem it necessary to correct this error on this occasion, the first opportunity

after it has come to our attention, and in so far as the *Pfeiffer Case* conflicts with the views here expressed it is overruled.

The facts and circumstances of the present case show sufficiently that the testimony of the deceased witness, Jacob Muza, had been taken in the Anton Zelin action, wherein this plaintiff was plaintiff and wherein the issue then being investigated was substantially the same as the issues that are being tried in this case. True, the parcel of real estate involved in the Zelin case is not identical with that here involved, but it appears that the two parcels were carved out of the whole parcel concerning which Jacob Muza, deceased, testified, and which, as the jury found, he occupied and held adversely "from July 1, 1877, and continually up to the time he transferred the land to Jacob Ciskowski . . . ," and which "the deceased, Valentine Muza, and his predecessors, Jacob Ciskowski and Jacob Muza No. 1, in title combined, [did] occupy and use . . . continuously for at least twenty years prior to the commencement of this action. . . ." It is evident that these parties in regular order succeeded to the right of Jacob Muza, deceased, and that the present occupants trace their title under adverse possession to Jacob Muza's occupation and use of the premises.

As indicated above, the trial court, under the facts and circumstances shown, is to determine whether the plaintiff had the opportunity of a full and adequate cross-examination of this witness in the Zelin case and had the same interest and motive to do so in the two actions. We cannot say that the trial court ruled erroneously in admitting this testimony. We are of the opinion that the facts and circumstances tend to show that Jacob Muza, deceased, occupied portions of Jones Island adversely and that his right under such occupancy was by him transferred to his successors, who continued such adverse possession in a continued and unbroken sequence and transferred the rights so acquired to those whom the plaintiff has sought to eject in the actions called "the Jones Island

cases." Under the circumstances of this litigation the issues in these actions are substantially the same. The foregoing observations apply with equal force to the questions raised concerning the competency of the testimony offered and admitted of other deceased witnesses and in both the Zelin and Bilot cases.

We discover no prejudicial error in the court's ruling admitting in evidence the piece of timber which it is alleged had been dug out of the ground on the premises and which it is claimed corroborated Muza's testimony respecting the construction of breakwaters. We have considered the other exceptions taken by appellant and deem them not well taken. The record presents no reversible error.

By the Court.—The judgment appealed from is affirmed.

KOMOROWSKI, Appellant, vs. JACKOWSKI and others, Respondents.

October 24—November 14, 1916.

Creditors' action: Execution: Judgment: Satisfaction: Fraud: Probate of forged will: Remedies: Circuit and county courts: Practice.

1. The return of an execution unsatisfied is the prime essential of a creditors' action.
2. Where a judgment creditor purchased at an execution sale, for the full amount of his judgment, the interest of the debtor in real estate, and obtained the sheriff's certificate, this was in effect a satisfaction of the judgment.
3. Where, after such judgment had become a lien on the interest of the debtor in said real estate as heir of his mother, the debtor and other heirs perpetrated a fraud upon the judgment creditor and upon the county court by procuring to be probated a forged will by which the debtor was given no part of said real estate, proceedings for relief against such fraud should be had primarily in the county court, and the creditor as purchaser at the

execution sale stood in the debtor's shoes sufficiently to be heard in the probate proceedings.

4. Although the creditor brought his action in the circuit court to obtain such relief, he need not commence proceedings over again, since the circuit court, under sec. 2836*b*, Stats., may certify the proceedings to the county court.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to certain portions of the complaint.

By the complaint it is recited that the plaintiff obtained a judgment in justice's court against the defendant *John C. Jackowski,* a transcript of which was filed in the circuit court for Milwaukee county in January, 1910; that execution thereon was issued to the sheriff, who, after demand upon and failure to pay by said defendant, sold to the plaintiff and for the full amount of said judgment and subsequent costs, all of the right, title, and interest which the defendant *John C. Jackowski* may have had in certain real estate in Milwaukee county, and gave the plaintiff the usual certificate of sale therefor on February 14, 1916.

That the defendants *John C. Jackowski, Statia Wawrzyniakowski,* and *Antoinette V. Jackowski-Peterson* were the only children and heirs at law of one Pauline Jackowski, who died in February, 1915, being possessed of certain personal property as well as of the real estate above mentioned.

That in July, 1915, the defendant *Statia Wawrzyniakowski* made petition to the county court of Milwaukee county for administration of the estate of said Pauline Jackowski. That thereafter and pending the sale on plaintiff's execution the defendant *Antoinette V. Jackowski-Peterson* filed in the said county court and had admitted to probate what purported to be a last will and testament of said deceased, wherein and whereby the defendant *John C. Jackowski* was not given any interest in the said real or personal property, but that which

would have been his share in said estate if said deceased had died intestate, namely, one third, was given to the defendant *Sadie Jackowski,* then and now wife of the defendant *John C. Jackowski.*

That during the administration of the said estate the defendant *John C. Jackowski* filed a claim therein for moneys expended by him for the deceased and for materials used and labor done on her real property aggregating $373.89. That on January 31, 1916, when said will was admitted to probate, the defendant *John C. Jackowski* withdrew such claim.

It is further alleged that the proceedings taken by the defendants above recited subsequent to the application for administration were done in fraud of plaintiff's rights and in furtherance of a conspiracy to prevent plaintiff from collecting his said judgment, and that the alleged will and testament so admitted to probate was a forgery and none such had been executed by said deceased.

The plaintiff further alleges that either said will should be declared null and void and the estate should descend as if said deceased had died intestate, or that the defendant *Sadie Jackowski* should be held as trustee of the creditors of said *John C. Jackowski* to an undivided one-third interest, and plaintiff offered to give to the said *Sadie Jackowski* a quitclaim deed to the interest acquired by plaintiff by said execution sale upon payment of the amount of his judgment and disbursements. He further demanded that the claim filed by the said *John C. Jackowski* against the estate of his deceased mother and thereafter withdrawn should be revived and continued and further proceedings had thereon for the benefit of plaintiff and other creditors.

By the amended prayer of the complaint plaintiff asked that a receiver be appointed for the benefit of the creditors of said *John C. Jackowski,* to be subrogated to all of his rights of any kind against said estate and to enforce the same. The defendants interposed separate demurrers, substantially that the

court is without jurisdiction; that the complaint does not state facts sufficient to constitute a cause of action; and that several causes of action are improperly united if any are alleged. The defendant *Antoinette V. Jackowski-Peterson,* who was designated as executrix in the alleged will of the deceased and appointed as such, further demurred on the ground that the court had no jurisdiction of the person of the defendant in her representative capacity.

The circuit court sustained the demurrers as to the allegations in the complaint wherein plaintiff set forth facts for the setting aside of the probate of the will of said deceased, and further held that the demurrers be overruled as to all the other allegations in the complaint wherein facts are alleged for a receiver, and gave the plaintiff leave to file an amended complaint.

The plaintiff appealed to this court from so much of said order as sustained that portion of the respective demurrers as above specified.

For the appellant the cause was submitted on the brief of *F. P. Hopkins.*

Alex. P. Greenthal, for the respondents.

ESCHWEILER, J. Appellant has denominated this a creditor's action. The allegations of the complaint, however, show that instead of an execution being returned unsatisfied, which is the prime essential of a creditor's suit (*Harrigan v. Gilchrist,* 121 Wis. 127, 273, 99 N. W. 909), the plaintiff pursued his legal remedies by the sale of real estate and the obtaining of the sheriff's certificate thereon, which must be considered in effect as a satisfaction of the judgment.

Viewing the complaint, however, in the light of the provisions of sec. 2649*a,* Stats., and as construed in *Sullivan v. Ashland L., P. & St. R. Co.* 156 Wis. 445, 448, 146 N. W. 506, that is, if upon the facts stated plaintiff is entitled to any measure of judicial redress, whether equitable or legal, and

whether in harmony with the prayer or not, such complaint shall, upon demurrer, be considered a sufficient pleading, it sufficiently appears, if its allegations be true, that a fraud was perpetrated upon the county court in the probate proceedings of the deceased Pauline Jackowski in having established as the last will of said deceased a forged document, and that it is to the damage of plaintiff. Having purchased the interest of defendant *John C. Jackowski* by the execution sale, the plaintiff stands in the shoes of *John C. Jackowski* sufficiently to be heard in the probate proceedings in question.

The county court, however, has properly assumed jurisdiction of the estate of said deceased and in that forum primarily should be tested all the questions that are raised by plaintiff about that estate. The court below, therefore, was right in holding that the circuit court should not assume jurisdiction over proceedings that attempted in effect to overthrow proceedings properly before the county court. *Archer v. Meadows,* 33 Wis. 166.

It is no longer necessary that the plaintiff should be driven to commence proceedings over again. Under sec. 2836*b,* part of ch. 219, Laws 1915, the court below might have promptly certified the proceedings to the court having proper jurisdiction, and such step may be now directed by this court to be taken.

By the Court.—The order appealed from is affirmed and the proceedings remanded to the circuit court with directions to certify the same to the county court of Milwaukee county for further proceedings, appellant to pay the clerk's fees in this court.

MILWAUKEE COUNTY, Respondent, vs. ILLINOIS SURETY COMPANY, imp., Appellant.

October 24—November 14, 1916.

Principal and surety: Bonds: "Obligations:" "Indebtedness."

Promissory notes given by the buyer pursuant to a contract for the purchase of goods were "obligations" arising out of the contract, and the amount due on them was "indebtedness arising out of" the contract, within the meaning of a bond given to secure payment of such obligations and indebtedness.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *Albert J. Hopkins,* of counsel, and oral argument by *E. H. Bottum* and *F. L. McNamara.*

For the respondent there was a brief by *Winfred C. Zabel,* district attorney; *William L. Tibbs,* special assistant district attorney, and *Daniel W. Sullivan,* assistant district attorney, and oral argument by *Mr. Tibbs.*

WINSLOW, C. J. The case may be simply stated. The Carson Manufacturing Company contracted in writing with the respondent county to purchase a large quantity of chairs to be manufactured at the Milwaukee house of correction during a certain period, paying therefor by promissory notes to be given at the end of each month, and the appellant at the same time gave a bond conditioned to pay all obligations and indebtedness to the county "arising or to arise out of said agreement." In the present action it appears that notes were given and not paid, and this judgment was rendered against the surety for the amount due on such notes. We cannot doubt that the notes were "obligations" arising out of the contract and that the amount due on them is "indebtedness aris-

ing out of" the contract. Statement of the proposition seems to us to constitute its proof. We know of no way to make the argument stronger.

By the Court.—Judgment affirmed.

WILL OF OWENS: CARROLL, Administrator, Appellant.

October 24—November 14, 1916.

Wills: Construction: Share of "deceased child:" "Revert:" Vesting of estates.

1. The paramount rule in construing a will is that the intention of the testator should prevail so far as that can be read out of the language used to express it.
2. When the death of a member of a class to which property is directly devised is mentioned in a will as a contingency on the happening of which the other members are to take the share intended for the deceased, a death precedent to that of the testator will be presumed to have been intended, if nothing to the contrary clearly appears by the will.
3. Thus, where a testatrix devised all of her property directly to her children "in equal parts, share and share alike, the issue surviving any deceased child to take by right of representation, and the share of any deceased child leaving no issue to revert to my other children in equal parts," she intended that the share of any child predeceasing her should go to the other children, and that those children living at the time of her death should take an absolute vested title in her property. *Will of Harrington*, 142 Wis. 447, and *Eggleston v. Swartz*, 145 Wis. 106, distinguished.
4. The word "revert" as used in such will means merely "go to."
5. The law favors the early vesting of estates and, in case of uncertainty respecting the purpose intended to be expressed by a testator, a construction which will accomplish that result is to be preferred to one which will not.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Action for construction of the will of Mary Elizabeth Owens, deceased.

The will was dated April 7, 1912. The testatrix died a few months thereafter. The will was duly established in the probate court for Milwaukee county, December 31, 1912. All the children of the testatrix survived her. There was a daughter, Margaret H. Carroll, wife of *Ellis F. Carroll.* She died March 1, 1913, and *Mr. Carroll* was, in due course, appointed administrator of her estate.

The following portions of the will are all which need be examined:

"Fourth. I direct, authorize and empower my executors hereinafter named as soon as possible after my death to sell and convert into cash all my real estate at such price and upon such terms as they may deem adequate and advantageous, and to that end give and grant them full power and authority to sell and convey such real estate without leave or authority from any court therefor.

"Fifth. Subject to the sale thereof by my executors as hereinbefore directed, I give, devise and bequeath unto my daughter Margaret Hannah Carroll the use, profit and income of my real estate during the first year next ensuing after my death, she, however, to defray all necessary repairs and fire insurance premiums, any and all taxes, general or special, levied or assessed thereon after the first day of January next preceding the date of my death and all interest upon outstanding incumbrances or mortgages; her said beneficial interest in my real estate to cease should my executors sell said real estate before the expiration of said year, in which latter event interest on incumbrance and taxes shall be prorated by my executors, my intention being that the proportionate part of taxes and interest to be allowed to my said daughter for that part or portion of the year after my death that may not have expired at the time of such sale.

"Sixth. Subject to the foregoing provisions, devises and bequests, I give, devise and bequeath all my property and estate (including the net proceeds, be my real estate sold and conveyed by my executors) unto my six (6) children: James

Owens, William Owens, Robert Owens, Elizabeth Mead, *née* Owens, Joseph D. Owens, and Margaret Hannah Carroll, *née* Owens, in equal parts, share and share alike, the issue surviving any deceased child to take by right of representation, and the share of any deceased child leaving no issue to revert to my other children in equal parts, share and share alike, subject, however, to the following condition and provision, to wit: The sum of two hundred and fifty ($250) dollars shall be deducted from the distributive share of my daughter Elizabeth Mead (or if deceased, her issue) and shall be added to the distributive share of my son Joseph D. Owens (or if deceased, his issue), the indebtedness from me to my son Joseph D. Owens and the indebtedness from daughter Elizabeth Mead to me, both in said amount, to be thereby extinguished."

In appropriate proceedings in the probate court, the executors of the will contended that the death referred to therein is one occurring before the time for distribution, hence that *Mr. Carroll* as sole heir of his wife and her personal representative was not entitled to any interest in the estate. He contended that the death referred to is one occurring during the life of the testatrix. He prevailed and the executors appealed to the circuit court, where the decision was reversed, it being held that the death intended by the testatrix was one occurring before distribution of the estate and therefore that, upon the death of Margaret, the share intended for her, conditioned upon her surviving until such time, belonged to the other children of the testatrix.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James H. McGillan,* of counsel, and oral argument by *F. L. McNamara.*

Adolph G. Schwefel, attorney for the executors, and *Andrew J. Clarke,* attorney for Owen heirs, for the respondents.

MARSHALL, J. What did the testatrix mean by the words, "the share of any deceased child leaving no issue to revert to my other children in equal parts, share and share alike"? That is the sole question to be determined. As above indi-

cated, the trial court reached the conclusion that she meant, the share of any child deceasing at any time before final distribution of the estate, should go to the other children, while appellant contends she meant, any child predeceasing her should so go.

The language under consideration is not altogether free from ambiguity. Therefore we must apply thereto settled rules for judicial construction.

Superior to all other rules for construing wills is the one that the intention of the testator should prevail so far as that can be read out of the language used to express it. *Will of Ehlers,* 155 Wis. 46, 48, 143 N. W. 1050. Passing that, there is no rule more familiar than that, in the absence of words showing a contrary intention, the death of a child, in a will where the bequest or devise is, in terms, to such child direct, with a provision, in case of the decease of such child, for the bounty to go to some other person or persons, refers to a death occurring during the lifetime of the testator. *Patton v. Ludington,* 103 Wis. 629, 640, 79 N. W. 1073. True, as indicated by the very language of the rule, and by many adjudications, such as *Miller v. Payne,* 150 Wis. 354, 374, 136 N. W. 811; *Chesterfield v. Hoskin,* 133 Wis. 368, 374, 113 N. W. 647, the death mentioned may refer to one subsequent to that of the testator; but the presumption is otherwise and will prevail in the absence of some pretty clear indication to the contrary found in the language of the will. In case of there being such, the presumption is thereby effectually displaced as indicated in *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659, and similar cases.

The court below seems to have been guided, in the main, by *Will of Harrington,* 142 Wis. 447, 460, 125 N. W. 986. It should be observed that the rule under discussion was there held not to apply for many reasons which do not characterize this case. Among such reasons were these: 1st, there was a precedent life estate; 2d, the estate devised to the children

was a life estate only; 3d, the beneficial interest was not to take effect so long as there was either a child or a grandchild of the testator living; 4th, it would result in want of harmony between the particular and other portions of the will. A careful reading of the case will show that it affords little or no assistance in discovering what the language in question was purposed to express.

Counsel for respondents rely upon *Eggleston v. Swartz,* 145 Wis. 106, 129 N. W. 48; but it seems the circumstances were quite different from those here. There was a precedent life estate. The devise over to the members of the class was not absolute; it was of a condition fee, and plainly such, as it was provided that, in case of the death of a member of the class, the share going to that one should go in fee to the then living children of such one, in case of there being any, otherwise, in fee, to the other members of the class. Thus the time of vesting in fee, absolute, as to the share devised to any member of the class, was expressly postponed until the death of such member, showing that death at any time was what the testator had in mind. There is nothing of that sort in the case before us. Here there was neither a precedent life estate, nor conditional fees created for the members of the testator's class. The mere use of the property by Margaret during the period allowed for administration, instead of the personal representative having that use, subject to the right of such representative to sell the property for the benefit of those to whom the same was directly given, does not answer to the call for a precedent estate displacing or tending to displace the presumption that the death of a member of a class to which property is directly devised when such an event is mentioned in a will as a contingency entitling the other members to take the share intended for the former, nothing appearing by the will, clearly, to the contrary, is a death precedent to that of the testator.

This other rule is an important guide in such circumstances as we have here. The law favors the early vesting of

estates and, in case of uncertainty respecting the purpose intended to be expressed by a testator, a construction which will accomplish that result is to be preferred to one which will not. *Moran's Will,* 118 Wis. 177, 196, 96 N. W. 367. Here it should be observed, as before indicated, that there is no precedent life estate and that the gift was direct. The latter feature is an important circumstance. In view thereof, and the rules referred to, we should be able to discover some quite unmistakable indication that the testatrix did not intend that her children, living at the time of her death, should take an absolute vested title to her property.

The trial court concluded that the word "revert" was not used in the will in the technical sense of "return" or "go back" because no such movement could occur without a precedent going from the source to which the return would take place. Evidently the testatrix did not intend that in case of a child being vested with title and possession of a share of her property, such share should, upon the death of such child, be divested for the benefit of her other children. So it must be that the word "revert" was used in the sense of "go to." The term has been given that meaning in cases where necessary to effect a testator's intention. *Beatty v. Trustees, etc.* 39 N. J. Eq. 452, 463; *Estate of Bennett,* 134 Cal. 320, 66 Pac. 370; *Johnson v. Askey,* 190 Ill. 58, 60 N. E. 76.

We reach the conclusion that the language under consideration must be read thus, "the share of any" child deceasing in my lifetime to go to "my other children." The word "revert" when given the meaning of "go to" pretty clearly indicates a going direct from the testator to the contingent beneficiaries, not from the deceased child, so that the death spoken of is one occurring before that of the testator. Such meaning makes harmony between all parts of the will and is consistent with all rules for judicial construction applicable to the matter.

Further discussion would not add anything of value to what has been said. We have been unable to discover any-

thing in the will displacing the presumption of intention from the language "the share of any deceased child . . . to revert to [go to] my other children" that a predeceasing of the testator was what she had in mind.

The result is that the judgment of the circuit court must be reversed and the cause remanded with directions to render judgment in accordance with this opinion and affirming the judgment of the county court.

By the Court.—So ordered.

ESCHWEILER, J., took no part.

AMERICAN CANDY COMPANY, Appellant, vs. ÆTNA LIFE INSURANCE COMPANY, Respondent.

October 24—November 14, 1916.

Master and servant: Injury to minor: Employers' liability insurance: "Employed in violation of law as to age:" Statute construed: Tender of defense: Conclusiveness of judgment: Estoppel.

1. Although the original employment of a minor fifteen years of age who had a permit was lawful, yet when he was put to work at a machine dangerous to life or limb contrary to sub. 2, sec. 1728*a*, Stats. (Laws 1909, ch. 338), he was "employed in violation of law as to age," within the meaning of an exception in an employers' liability insurance policy.
2. In said sub. 2, sec. 1728*a*, Stats.,—providing that "no child under the age of sixteen years shall be employed in" operating any of numerous machines specified "or in any other employment dangerous to life or limb," etc.,—the word "employed" covers a case of putting such a child to work at a machine, and the putting him or directing him to work in such a place is an employment to work in such place.
3. Where the defense in an action is duly tendered to one who may under any aspect of the case be liable over to the party sued, the person to whom the defense is tendered and who has opportunity to defend becomes in legal effect a party to the action and is bound by the judgment. The estoppel of the judgment in such case is mutual.

4. Upon being sued for injuries to a minor employee the employer tendered the defense of the action to an insurance company in which it held a liability policy. The insurance company refused to defend except on condition that it be not bound by the result, claiming that the minor had been employed contrary to law and that the policy did not cover the injury. The employer refused to consent to a defense under such reservation, and itself defended the action. It was found therein that the minor was employed in violation of law, and he recovered a judgment, which the employer paid. In an action against the insurance company to recover the amount so paid it is *held* that said judgment is conclusive of the fact that the minor was employed in violation of law.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought against the defendant to recover the amount of two judgments recovered against the plaintiff for injuries received by one Michael Kowalski, a minor fifteen years of age, while in the employ of plaintiff, together with costs and attorneys' fees. One of the judgments was recovered by the minor and the other by the minor's father. The plaintiff paid the judgments, and in the present action seeks to recover the amount from the defendant under a policy of employers' liability insurance.

When the plaintiff rested its case the court below granted a nonsuit and ordered judgment for defendant. Judgment was entered accordingly, from which this appeal was taken.

Lawrence A. Olwell, attorney, and *C. H. Van Alstine,* of counsel, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and oral argument by *J. V. Quarles.*

KERWIN, J. The controverted questions upon this appeal are (1) whether the accident which was the basis of the judgments paid by the plaintiff was covered by the policy, and (2) whether the judgments are a bar to this action.

1. On the 25th of August, 1910, defendant issued to plaintiff its policy of manufacturers' employers' liability insurance. This policy continued in force up to and including April 7, 1913. The liability of the insurer under the policy was limited on account of accidents resulting in injuries to one person to $10,000. There was excepted by the terms of the policy liability for injuries received by any person employed in violation of law as to age, or of any age under fourteen years where there is no legal restriction as to age of employment.

On October 9, 1912, the injured minor applied at plaintiff's plant for work, produced a permit in proper form under the statute, was hired, and put at work in the starch room of plaintiff's factory on the sixth floor. The permit was duly filed. Afterwards the minor was called to the fourth floor to work, where one Bennett was foreman, and as claimed by plaintiff was put at work in a safe place, while defendant claims he was put at work on a sizer, a dangerous machine, where he was injured April 7, 1913.

In the actions brought by the minor and his father against the plaintiff the jury found in substance that the minor was directed by the foreman, Bennett, to work upon the sizer; that Bennett permitted or suffered him to work upon the sizer; that the sizer was dangerous to life and limb of a person under sixteen years of age; that at the time of the injury the minor was engaged in a work that he was directed or permitted to pursue.

The plaintiff duly tendered the defenses in both actions against plaintiff to the defendant, respondent here, and it refused to assume the defense except on condition that it be not bound by the result, for the reason that it claimed the minor was employed by appellant contrary to law, hence the policy did not cover the injury to the minor complained of.

The plaintiff replied to the communication of defendant, saying that it would not consent to any defense under the reservation stated, but insisted that the defendant defend ab-

solutely or not at all, since it did not admit that the minor was employed contrary to law. The plaintiff further notified the defendant that if it did not defend without reservation plaintiff would defend in its own protection and look to the defendant to pay the judgment, if any rendered, expenses, and counsel fees attendant upon the defense. The plaintiff in its communication to defendant regarding the tender of defense said that it would insist that the defendant be bound and concluded by such judgment as might be rendered in the actions on the defense made by plaintiff.

The defendant refused to defend and waive its rights, and the plaintiff defended the two actions with the result before stated. It is without dispute that the minor was fifteen years of age at the time of injury.

The appellant contends that, assuming the facts found in the actions by the minor and his father against the plaintiff, the minor was not "employed" in violation of law because the original employment under the permit was lawful and that the policy of insurance covered all cases where the person came legally into the employ of the assured, and that the exception in the policy whereby the defendant excepted from its assumed liability injuries caused to any person employed in violation of law as to age, included only injuries sustained by persons so young that they could not contract, or who had contracted to do work which the law prohibited.

The argument is that, if the contract between the minor and employer at the date of the employment was legal, no subsequent use of the minor by putting him to work at a prohibited employment would be an employment in violation of law as to age within the meaning of the policy.

We think the construction contended for by appellant is too narrow. The statute as it stood at the time of the issuance of the policy read:

"No child under the age of sixteen years shall be employed in adjusting any belt or in oiling or assisting in oiling, wiping or cleaning any machinery when the same is in mo-

tion, . . . nor shall any such child be employed at or assist in sewing belts in any capacity or in the manufacture of paints, . . . nor in any tobacco warehouse, . . . or in any place where intoxicating liquors are made . . . or in any other employment dangerous to life or limb." Sub. 2, sec. 1728*a*, Stats. (Laws 1909, ch. 338).

Putting the minor to work at a machine dangerous to life and limb we think is an employment contrary to law. It seems clear that the legislature could not have intended otherwise, because the object of the law was to protect minors from employments dangerous to life and limb. It is urged by appellant that the subsequent amendment, by the addition of the words "required, suffered or permitted," indicates a legislative intent to reach conditions not covered by the word "employed." Whether the addition of these words broadens the statute or was intended to make it more clear and definite we need not and do not decide. We think the word "employed" as it stood in the statute before amendment covers a case of putting a minor to work at a machine; that the putting him or directing him to work in such a place is an employment to work in such place.

In *Comm. v. Griffith,* 204 Mass. 18, 90 N. E. 394, it is held that the word "employ" as used in the child labor statute means "to use as a servant, agent or representative." See, also, *State v. Foster,* 37 Iowa, 404; *State v. Deck,* 108 Mo. App. 292, 83 S. W. 314. In *Buffalo S. Co. v. Ætna L. Ins. Co.* 136 N. Y. Supp. 977, at page 982 it is said:

"We think to put a person under sixteen operating a dangerous machine is employing him in violation of law. The word 'employ,' when used in the labor law and in the policy of insurance in question, has a broader meaning than the mere 'hiring' of a person. It means, rather, 'to have in service, to cause to be engaged in doing something.' Webster, Dict. To limit the meaning of the word to the mere act of hiring would operate to defeat the plain meaning and purpose of the statute and of the contract of insurance; and, while the section in question provides that children under six-

teen shall not be permitted to 'operate' dangerous machinery, it must be held that one so put at work is 'employed' in violation of law."

It is established that the plaintiff put the minor at work on the machine in question, viz. the sizer, and that such machine was dangerous to life and limb. The case of the minor against the plaintiff was appealed to this court and the decision of the trial court affirmed. *Kowalski v. American C. Co.* 160 Wis. 341, 151 N. W. 805.

2. The appellant insists that it is not estopped in the instant case from litigating with the respondent the question as to whether the minor was employed in violation of law.

The court below found that the minor was employed in violation of law as to age, and the jury in both cases found that the minor was directed by the foreman of appellant to work upon the sizer, and that the machine was dangerous to life and limb, and the decision on appeal in the case of the minor against appellant here was affirmed by this court. 160 Wis. 341, 151 N. W. 805.

It seems clear, therefore, from the record in the two cases referred to against the plaintiff on account of the injury complained of and the decision on appeal to this court that the minor was employed contrary to law, hence the injury was not covered by the policy. The only question remaining is whether the former judgments against the appellant are conclusive. We are of opinion that they are. The rule seems to be well settled that where the defense in an action is duly tendered to one who may under any aspect of the case be liable over to the party sued, the person to whom the defense is tendered and who has opportunity to defend becomes in legal effect a party to the action and is bound by the judgment. *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1; *Giblin v. North Wis. L. Co.* 131 Wis. 261, 111 N. W. 499; *Grunert v. Spalding,* 104 Wis. 193, 214, 80 N. W. 589; *B. Roth T. Co. v. New Amsterdam C. Co.* 161 Fed. 709.

The estoppel of the judgment in such case is mutual. So the judgments in the two cases against the plaintiff not only concluded the defendant in this action but the plaintiff here as well. *B. Roth T. Co. v. New Amsterdam C. Co., supra; Fulton County G. & E. Co. v. Hudson River T. Co.* 200 N. Y. 287, 93 N. E. 1052; *Rowell v. Smith, supra; Giblin v. North Wis. L. Co., supra; Grunert v. Spalding, supra.*

It follows that the judgment of the court below must be affirmed.

By the Court.—The judgment is affirmed.

LIPPS, by guardian *ad litem,* Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 24—November 14, 1916.

Infants: Injuries before birth: Cause of action.

1. No cause of action accrues to an infant for injuries received while *en ventre sa mere* and before it could be born viable.

[2. Whether a cause of action for injuries received before birth accrues to an infant capable at the time of injury of being born viable, is not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action, by guardian *ad litem,* to recover damages for personal injuries sustained on defendant's car by plaintiff on September 5, 1912, while a fœtus *en ventre sa mere* of the age of about five months and before she could have been born viable. Plaintiff's father and mother settled with the defendant for the damage sustained by them. In due course of time plaintiff was born, and it is alleged that she suffers from epileptic fits as a direct result of the prenatal injuries received. Defendant demurred to the complaint on the

ground that it failed to state facts sufficient to constitute a cause of action, and because it appeared on the face thereof that plaintiff had not the legal capacity to sue. The court sustained the demurrer and entered judgment dismissing the action, from which judgment the plaintiff appealed.

Oscar Kroesing, for the appellant.

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *Carl Muskat.*

VINJE, J. But few cases of this kind are found in the reports though there must have been many occasions for bringing them had it been generally considered by the legal profession that a cause of action accrues to a child for injuries received before birth. This paucity of cases, however, does not determine the right to maintain such an action, but it does indicate, no doubt, the general view relative thereto held by the legal profession. Our attention was called by counsel on both sides to but six cases involving the question under consideration. Independent search has failed to find others directly in point. The first case was that of *Dietrich v. Northampton,* 138 Mass. 14 (decided in 1884), where as the result of a fall on a defective highway a woman between four and five months advanced in pregnancy was delivered of a child that lived only a few minutes after its birth. It was held that such a child was not a *person* for the loss of whose life an action may be maintained within the meaning of Pub. Stats. ch. 52, § 17, which gives a right of action for negligently causing the death of a person. The court, through HOLMES, J., says:

"Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning."

The next case, that of *Walker v. G. N. R. Co.* 28 L. R. (Ir.) 69 (decided in 1890), was one where a woman quick with child was injured while a passenger on defendant's train in such a manner as to permanently wound and cripple plaintiff, then *en ventre.* The opinions of the judges do not all agree as to whether or not an action for injuries to an unborn child may not under any circumstances be maintained, but they do all agree that since defendant's contract relations were with the mother alone and not with the plaintiff, the latter has no cause of action. The case of *Allaire v. St. Luke's Hospital,* 184 Ill. 359, 56 N. E. 638 (decided in 1900), presents the question in its broadest form. There plaintiff's mother, about ten days before she expected to be confined, went to the defendant for the express purpose of treatment and care during her accouchment. While in the hospital for such purpose she was negligently injured in an elevator therein in such a way that plaintiff, who was born four days later, was also severely injured. After reviewing *Dietrich v. Northampton,* 138 Mass. 14, and *Walker v. G. N. R. Co.* 28 L. R. (Ir.) 69, and in summing up the case, the opinion of the appellate court, adopted by the supreme court as its opinion, proceeds:

"That a child before its birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of the opinion that the action will not lie."

BOGGS, J., in an able dissenting opinion argued that a cause of action should accrue to every child capable at the

time of injury of being born viable for injuries received *en ventre,* where the defendant knew or ought to have known of its existence at the time of the injury, upon the broad ground that an infant capable of being born viable is in fact an independent person or being which the law of torts should recognize as such. In *Gorman v. Budlong,* 23 R. I. 169, 49 Atl. 704 (decided in 1901), a woman gave premature birth to a child by reason of injuries received through the negligence of the defendant, which child lived only a couple of days after birth. The court held that, since no cause of action accrued to the child, none could be maintained by the next of kin. In *Nugent v. Brooklyn Heights R. Co.* 154 App. Div. 667, 139 N. Y. Supp. 367 (decided in 1913), the plaintiff sued for injuries received thirty-six days before his birth, while his mother was a passenger on defendant's car. The argument of THOMAS, J., writing the opinion of the court, is to the effect that an infant may in some cases have a cause of action for injuries received before birth; but the court held that since there was no contract relation between the unborn infant and the defendant no recovery could be had. The case of *Buel v. United Railways Co.* 248 Mo. 126, 154 S. W. 71 (decided in 1913), holds that since no cause of action accrued to a child who died about six months after birth from injuries received before birth while its mother was a passenger on defendant's street car, none survived to next of kin. The case does not turn on a lack of contract relation between the unborn child and the defendant, but is based upon the ground that, since by common law no cause of action accrued to an infant for injuries received before birth, none was given by the survival statute.

Quotations have been made from some of the foregoing cases not necessarily for approval but to show the trend of judicial thought concerning the question. It will be noticed that in all cases, though courts have differed as to the grounds of denial, the right to maintain the action has been negatived. All, however, so far as expression is found therein, agree

that no cause of action accrues to an infant for injuries received before it could be born viable. Such is the present case. The complaint alleges the child could not have been born viable. Since a non-viable child cannot exist separate from its mother, it must in the law of torts be regarded as a part of its mother, and hence, being incapable of a separate existence, it is not an independent person or being to whom separate rights can accrue. Its rights are merged in those of the mother of whom it forms a part.

We go no further than the facts of the case require, and hold that no cause of action accrues to an infant *en ventre sa mere* for injuries received before it could be born viable.

Very cogent reasons may be urged for a contrary rule where the infant is viable, and especially so in cases where the defendant, being a doctor or midwife, has negligently injured an unborn child. As to such cases we express no opinion.

The fact that the criminal law protects non-viable infants does not affect the question of their civil rights. The criminal law rests upon grounds of public policy and affects the public; the law of torts relates solely to the rights of private parties. So, too, the fact that for purposes of inheritance, taking under a will, etc., the existence of unborn children is recognized in law has no particular bearing upon the question of their right to recover for injuries sustained before birth. Neither does the medical or scientific recognition of the separate entity of an unborn child aid in determining its legal rights. The law cannot always be scientific or technically correct. It must often content itself with being merely practical.

By the Court.—Judgment affirmed.

BELL and another, Respondents, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

October 25—November 14, 1916.

Carriers: Bill of lading: Deposit by consignee with carrier's agent: Subsequent sale by consignee: Right of stoppage in transitu: *Wrongful delivery by carrier: Conversion: Pleading: Judgment.*

1. As between the consignee of grain and the carrier, a deposit of the bill of lading by the consignee, pursuant to custom, with the agent of the carrier on the board of trade at the point of destination was a mere matter of business convenience and did not pass the title to the carrier.
2. A consignee of goods who, after their arrival and after he has paid for and obtained the bill of lading, sells them to another has, as vendor and as against the carrier, the right of stoppage *in transitu* until the goods arrive in the possession, actual or constructive, of the purchaser.
3. After depositing the bill of lading with defendant's board of trade agent, plaintiffs sold to one G. a carload of oats which had been shipped to them over defendant's railway, and gave G. a written order for the car. Such order was by mistake addressed to another railway company, and G. presented it to that company, which issued to him a new bill of lading. On the following day plaintiffs, having learned that the check given to them by G. was worthless, notified defendant to hold and not to deliver the car. Defendant afterwards, at the request of the other railway company, delivered the car to it, and subsequently delivered the original bill of lading to plaintiffs. *Held* that, the original bill of lading not having come to the possession of G., he had no such actual or constructive possession of the car as precluded plaintiffs from exercising, as they did, their right of stoppage *in transitu* while the car was still held by defendant.
4. Although the action against the defendant railway company was in form for a breach of the contract of carriage, judgment as for a conversion of the goods was properly rendered in accordance with the facts disclosed on the trial.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court affirming a judgment of the civil court in favor of the respondents.

The plaintiffs had shipped to them from a point in Iowa a carload of oats, the final carrier of which was the defendant railway company. On April 8, 1915, a bill of lading was duly received by the plaintiffs and deposited with the agent of the defendant, who, for the convenience of members of the chamber of commerce, had an office in said chamber of commerce. On April 9th one Charles F. Glavin arranged to purchase this car from the plaintiffs and he gave them his check for the same and other cars, and received a written order for the car in question together with the others. The order was by mistake directed to the Chicago, Milwaukee & St. Paul Railway Company instead of to the defendant and was presented to the Chicago, Milwaukee & St. Paul Railway Company on April 9th, and thereupon and while the car was still in the custody of the defendant a new bill of lading was issued for the same to said Glavin by the Chicago, Milwaukee & St. Paul Railway Company. On April 10th, in the forenoon, the plaintiffs ascertained that default had been made in the payment of the check and thereupon immediately notified the defendant by telephone that the car should be held and not delivered.

On the afternoon of the same day the agent of the Chicago, Milwaukee & St. Paul Railway Company telephoned to the agent of the defendant that the St. Paul Railway Company had the order above specified for this particular car and desired to have it delivered from the defendant's tracks to those of the Chicago, Milwaukee & St. Paul Railway Company. The car was so delivered on Monday the 12th. The first bill of lading was subsequently delivered to plaintiffs.

The complaint was in form one for breach of the contract of carriage from Iowa to Milwaukee, alleging that the defendant did not deliver the oats to the plaintiffs and negligently allowed the same to be wholly lost, and prayed for damages for $824.19, the value of the oats. The claim of the defense was that the car had been sold on April 9th and delivered to

the said Charles F. Glavin, and that Glavin gave a written order for the car to the Chicago, Milwaukee & St. Paul Railway Company and that that railway company issued a new bill of lading therefor to the said Glavin; that on April 10th the last named railway company requested the defendant to deliver the said car to them and that the same was so delivered on April 12th; that the plaintiffs were estopped by such facts from claiming said car from defendant. The answer also denies any failure to safely carry and deliver, or that it lost the oats, or that the plaintiffs were the owners when they requested delivery be made to them.

Findings were made in the civil court, among others the following:

"(3) That the plaintiffs, pursuant to custom, deposited said bill of lading with the board of trade agent of the *Chicago & Northwestern Railway Company;* that while so deposited, said bill of lading was at all times subject to the order of the plaintiffs, and that said bill of lading was never surrendered to said defendant railway company."

Upon this and the other findings judgment in form as for a conversion was entered for the plaintiffs for the value of the carload of oats. On appeal to the circuit court the judgment was affirmed, and from that judgment of affirmance an appeal was taken to this court.

For the appellant there was a brief by *E. M. Smart* and *R. M. Trump,* and oral argument by *Mr. Trump.*

William Kaumheimer, for the respondents.

ESCHWEILER, J. The contention of defendant and appellant on this appeal is that because of the delivery of the bill of lading by the plaintiffs to the agent of the defendant at the board of trade in Milwaukee, and the giving of the misdirected order for the same to the intended customer, Charles F. Glavin, the plaintiffs no longer had control of the said car on April 8th, and that their subsequent order on the 10th to

hold the same while the car was still in the possession of the defendant could be disregarded, and that it was therefore justified in turning over the car to the Chicago, Milwaukee & St. Paul Railway Company on April 12th.

As between the plaintiffs and the defendant the delivery of the bill of lading to the custody of defendant's agent on the board of trade was not, under the undisputed facts, with the intention of passing title to the car to the defendant, and the court therefore properly found that such delivery was a mere matter of convenience. The bill of lading did not come into the actual possession of Charles F. Glavin so that it might have been claimed that validity would be given to any transfer made by him under sec. 4425, Stats., which provides that such bill of lading may be transferred by delivery without indorsement or assignment and that the person so taking the same shall be deemed the owner of the property therein specified, as in the case of *Fenelon v. Hogoboom,* 31 Wis. 172.

Upon the arrival of the car and plaintiffs paying for and obtaining the bill of lading they become the owners thereof and as vendors thereafter entitled to the right of stoppage *in transitu.* As against the defendant common carrier, the right of stoppage *in transitu* remained in plaintiffs until the goods arrived in the possession, actual or constructive, of the purchaser. *Jeffris v. Fitchburg R. Co.* 93 Wis. 250, 67 N. W. 424; *Brewer L. Co. v. B. & A. R. Co.* 179 Mass. 228, 231, 60 N. E. 548; *State v. Intoxicating Liquors,* 104 Me. 463, 72 Atl. 331, 23 L. R. A. N. S. 1020; *Durgy C. & U. Co. v. O'Brien,* 123 Mass. 12; *Inslee v. Lane,* 57 N. H. 454.

Under the facts shown and as here stated, there was no such actual or constructive possession of the car in Charles F. Glavin as terminated plaintiffs' right to prevent its further passing from the actual possession of the common carrier then holding it under the original bill of lading.

The appellant contends that inasmuch as the complaint was based upon the theory that there was a breach of the con-

tract duty of defendant to safely carry the goods from Iowa to Milwaukee and the facts disclose that the car did arrive there safely, they could not be required to litigate in this action the question whether, after the arrival of the car there, there had been a tort committed by the conversion of the oats by the defendant, and that to do so would necessarily require a determination of the possible rights of persons not before the court, namely, the Chicago, Milwaukee & St. Paul Railway Company, Charles F. Glavin, and any person to whom he may have sold the car of oats or the new bill of lading issued by the latter company.

No question can be raised, however, but that the court had the power and that it was its duty, no matter what the form of complaint, to give judgment in accordance with the facts disclosed on the trial.

No suggestions were made on the trial that any other person should be brought in as a party to the action, nor does the record disclose that there were any offers of proof or requests made by the defendant to have any other question determined than that which was determined. The defendant relied then, as it does now, upon its contention that Glavin, not the plaintiffs, had control of the car after defendant received the bill of lading and the giving of the misdirected order for the car. We cannot, however, adopt that view of it, and therefore upon the record as it stood the civil court was warranted in entering the judgment that it did, and the judgment should be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

LLOYD INVESTMENT COMPANY, Respondent, vs. ILLINOIS SURETY COMPANY and another, imp., Appellants.

October 25—November 14, 1916.

Principal and surety: Discharge of surety: Building contract: Construction: Advance payments: Negotiable notes: Breach of contractor's agreement to loan money: Damages: Final settlement: Questions for jury: Evidence: Harmless error.

1. Where the performance of a contract is guaranteed by a surety, any material, substantial, and prejudicial variation of its terms will discharge the surety.
2. Advance payments not provided for in the contract, while they constitute a variation of its terms, will not discharge the surety if it affirmatively appears that under all the circumstances the departure from the agreement was immaterial and nonprejudicial.
3. A building contract which provided for payment of $5,000 on or before completion of the mason work, to be made by delivery of the owner's promissory note payable on or before a specified date, and for a payment of $5,000 when the first-floor stores were ready for occupancy, also to be made by delivery of a promissory note "made, executed and dated on or before the time when said first-floor stores are ready" and payable on or before a specified date, and in which the contractor further agreed to accept payment of said notes and of the final amount ($3,000) due on the contract in notes payable $500 every three months, is construed as permitting the owner to give the two $5,000 notes in negotiable form, and the giving of them in such form was therefore not such an advance payment as would discharge a surety; nor was the giving of the second note a short time before the first-floor stores were ready for occupancy a material or prejudicial departure from the contract.
4. The owner having given the two $5,000 notes in negotiable form, they were negotiated by the contractor, and when they became due the owner gave a new $10,000 note to take them up. *Held* that, the contractor having rendered himself incapable of taking new securities in payment of the $5,000 notes as he had agreed, the giving of the new note was not an election by the owner to pay those notes in cash rather than in new securities.
5. The agreement of the contractor to accept $13,000 in notes payable $500 every three months was in effect an agreement to loan

the owner $13,000; and for his breach of such agreement the contractor was liable for such damages as should have been reasonably in contemplation by both parties, when the agreement was made, as a probable result of a breach of it, including in this case commissions necessarily paid in procuring a loan from other sources and the difference between interest at the rate agreed upon and at the rate the owner was compelled to pay.

6. Whether, at the time the contractor gave a receipt "for payment of balance due under the contract and for extras," a complete settlement of all matters relating to the contract was made, thereby discharging the surety, was a question which, under the evidence, it was not clearly error to submit to the jury.

7. The rejection of evidence offered on behalf of the surety as to a conversation between the contractor and the president of the owner regarding extras, was not a prejudicial error, there being no recovery or basis for a recovery for extras, and it not being probable that the reception of such evidence would have changed the finding of the jury on the question of settlement.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action to recover damages for alleged breaches of a building contract made between plaintiff and defendant Utley, September 2, 1913, whereby the latter agreed to furnish all the material and labor and construct for the former a building, according to certain plans and specifications, for the sum of $23,000, the performance of which was guaranteed by the defendant surety company.

The contract provided that the sum aforesaid should be paid, $2,500 in cash upon completion of the foundation, the same to be secured by plaintiff's promissory note indorsed by one Jacobson, and bearing even date with the contract, payable on or before thirty days; $2,500 in cash when the walls and first floor were completed, secured by an indorsed note as before, payable on or before sixty days from date; $5,000 in cash upon the building being under roof, the same to be secured by plaintiff's note payable to the order of Utley, guaranteed by said Jacobson and executed and delivered at the time of the completion of the first floor and walls to grade,

and payable on or before sixty days from date; $5,000 on or before the time of completion of the mason work, the payment to be made by delivery of plaintiff's promissory note indorsed or guaranteed by said Jacobson, payable on or before January 1, 1914, and to then be taken care of as hereinafter indicated; $5,000 upon the first-floor stores being ready for occupancy, payment to be made by note indorsed as before, said note to be made, executed, and dated on or before the time when the first-floor stores were ready for occupancy, and payable on or before January 1, 1914; and the balance, $3,000, upon completion of the building to the satisfaction of plaintiff, said $3,000 and the two $5,000 notes payable January 1, 1914, to be paid in cash or securities acceptable to Utley, at plaintiff's option, said Utley to accept the promissory note, or notes, of plaintiff for the $13,000, secured by a second mortgage on the building and premises, in case of the first mortgage not being over $29,000; said note or notes not to bear interest at over five per cent. per annum, payable annually, and providing for the principal of said note or notes to be paid, $500 every three months; and provided further that the plaintiff shall have legal title to the property, incumbered for not more than $29,000.

The contract further gave Utley the privilege to provide or furnish plaintiff the money to enable him to pay the amount due on the land contract he held on the premises and to provide for second-mortgage securities on the same, and plaintiff agreed, if acceptable to Utley, to undertake to procure a loan on the premises in excess of $29,000, so the latter would receive in cash, instead of mortgage securities, the amount thus raised on first mortgage in excess of the amount payable on the land contract, in such case Utley to have a mortgage on the premises for the balance that would then be due and owing. The contract further provided that in case plaintiff, with or without the assistance of Utley, should be unable to procure a deed of the property, so as to make mortgages there-

on, Utley should accept as security for payment of the $13,000 in notes the land contract plaintiff held on such property, with an assignment thereon, on which contract plaintiff represented there was to be paid as principal not to exceed $29,000.

The last two $5,000 notes were given in negotiable form and were negotiated by Utley at the Merchants & Manufacturers Bank, in Milwaukee, Wisconsin. One was renewed at the bank January 3, 1914, for a short time. February 6, 1914, plaintiff gave Utley a note of $10,000, payable to his order in three months with interest at the rate of five per cent. per annum. It was guaranteed by the aforesaid Jacobson and indorsed by Utley and one Bitker. It was used at the bank to take up the two $5,000 notes, Bitker depositing stock as collateral security. The note was not paid when due. The bank put it in judgment and plaintiff paid such judgment.

Before the building was completed, Utley became financially embarrassed and appointed E. J. Patterson to act for him, who did so act thereafter in the matters appertaining to the building contract.

During the pendency of the action, Utley was adjudged a bankrupt and *James S. Hopkins* was appointed receiver for the surety company and was duly made a defendant.

So far as the trial court regarded the evidence as in conflict, the issues were submitted to the jury for a special verdict. The result was, in effect, as follows: The requirement of the surety bond as to notice in writing to the surety company of defaults, also the requirement as to commencing suit for damages within six months after any breach of the contract, were waived. Defendant agreed to protect plaintiff from any loss that might result to it if the latter refused to pay the $10,000 note when due. There was no material alteration in the manner of erecting the building, to plaintiff's knowledge. There was no final settlement between the parties. There was de-

lay of 63 days in the contract time for completing the stores on the lower floor ready for occupancy. There was delay of 101 days in the contract time for completing the building.

In addition to the foregoing the jury found damages on plaintiff's claims which were submitted, aggregating $2,825 and the court found, on the undisputed evidence, as was supposed, other items of damages, making in all $9,472.94. Included in the court's findings were $2,000 for commissions paid in procuring the loan which, it was claimed, Utley failed to provide as per contract, and $2,087 for difference in interest between the rate agreed upon and the rate plaintiff was compelled to pay.

Judgment was rendered in plaintiff's favor in accordance with the aforesaid findings.

For the appellants there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McNamara* and *E. H. Bottum.*

For the respondent there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *Paul R. Newcomb,* of counsel, and oral argument by *Mr. Newcomb.*

MARSHALL, J. No complaint seems to be made but what the court submitted to the jury all material disputed matters of fact. The questions raised are mainly questions of law, and are few in number. All will be treated which seem to merit consideration.

The contract is ambiguous in several particulars, so the trial court, in reaching its conclusion, was obliged to construe the language thereof.

Did the contract permit the plaintiff to give the contractor the two promissory notes which were made payable January 1, 1914, in negotiable form? That is the first matter submitted. It is contended on the part of appellants that it did not and that, in so doing, there was a material prejudicial departure from the agreement, in that, thereby, respondent was rendered incapable of protecting itself, to the extent of

$10,000, from damages caused by the contractor's failures to perform as he agreed.

It is well settled that any material, substantial, and prejudicial variation of the terms of a contract, where performance by the contractor is insured by a surety, will discharge such surety, and that advance payments, not provided for in the contract, constitute such a variation, as, thereby, the contractor's interest in performing his agreement is lessened and the surety has a right to the benefit of such interest and is presumed to rely thereon. *Stephens v. Elver,* 101 Wis. 392, 77 N. W. 737; *Kunz v. Boll,* 140 Wis. 69, 121 N. W. 601. But even advance payments will not discharge the surety if it affirmatively appears that, under all the circumstances, the departure from the agreement was immaterial and nonprejudicial. The principle must be kept in mind that a surety is so discharged only when the departure is material and prejudicial, and not otherwise.

If the giving of the two $5,000 notes in negotiable form was a departure from the contract, so as to amount, in effect, to an advance payment, as claimed, a pretty conclusive case of prejudicial variance would be presented. But, as we construe the contract, it contemplated just such a circumstance. The agreement was to give promissory notes at the time they were given and payable at the time therein provided. The evident purpose was to aid the contractor in obtaining money to enable him to carry out his contract. The only way that could have been efficiently accomplished was by giving negotiable promissory notes, as was done. The provision was evidently inserted in the contract to enable him to have an equivalent of cash payments at the time of delivery of the notes. If it had been intended that nonnegotiable notes should be given, doubtless, an unmistakable stipulation on the subject would have been made.

We do not overlook the fact that the contractor agreed to accept payment of the two $5,000 notes when due and the final amount of $3,000 on the contract in notes due $500

each three months. Doubtless, that required him to take up the $5,000 notes when due so as to carry out his agreement, but it did not operate to limit respondent to giving notes in nonnegotiable form.

It is suggested that the $5,000 note which was agreed to be given when the first-floor stores were ready for occupancy was given before that time and that such circumstance constituted a prejudicial departure from the contract. Here again the language of the agreement is involved in some obscurity. While it was provided that $5,000 should be paid "when the first-floor stores were ready for occupancy," it was also provided that "the said payment to be made by delivery to said party of the first part of the promissory note of said party of the second part, indorsed or guaranteed by said Julius Jacobson, said note to be made, executed, and dated on or before the time when the first-floor stores are ready for occupancy." It is considered that the parties probably meant thereby that the payment should be made when the first-floor stores were ready for occupancy but that the note might, at respondent's option, be given on or before that time. But if that be not so, it is considered that the giving of the note a short time before the first-floor stores were ready for occupancy was not a material prejudicial departure from the contract.

It is further suggested that the circumstance of respondent taking up the notes and giving a new one was an election under that clause of the contract permitting it to pay when due in cash or by securities acceptable to the contractor. That seems clearly wrong. The contractor rendered himself incapable of taking the new securities in lieu of cash for the two $5,000 notes and, therefore, respondent had no opportunity to efficiently make an election. It gave the new note because it was compelled to do so, not because it preferred to pay them in cash rather than in new securities which the contractor agreed to take if respondent so desired.

It is further contended that error was committed in awarding damages to the extent of $4,087.50 on account of the

contractor failing to loan respondent $13,000 to provide for the two $5,000 notes and the $3,000 last to be paid on the contract. Counsel base this on the idea that the trial court was wrong in the theory that Utley agreed to furnish respondent $13,000 to take care of the two notes and such last payment. On the contrary it seems to us that such theory is clearly right. It was expressly stipulated that Utley, at respondent's election, should take $13,000 in notes, $500 due each three months after January 1, 1914, in payment of the two $5,000 notes and the last instalment on the contract. That is, in effect, Utley agreed to loan respondent $13,000 for the purposes of making such payment. He rendered himself incapable of doing it by putting the two notes beyond his control, thus compelling respondent, in the end, to pay them in cash, and by permitting liens on the building aggregating more than the $3,000 last payment which respondent was compelled to provide for. Had Utley carried out his agreement, respondent would have been enabled, through, in effect, a loan by the former, to pay off this $13,000, $500 every three months, with interest at the rate of five per cent. per annum. So the claim of appellants that the basis for the court's finding on this point is without foundation cannot be sustained.

The contract very clearly, as we view it, obligated Utley to provide the $13,000 which respondent was compelled to raise. That was one of the obligations covered by the surety bond. Under the peculiar circumstances which the contract shows were brought home when the contract was made, the damages awarded for his failure to provide the $13,000 were such as should have been reasonably in contemplation by both parties when the agreement was made as a probable result of the breach of it, and so fall within the rule for assessing damages for such breaches. *Guetzkow Brothers Co. v. A. H. Andrews & Co.* 92 Wis. 214, 66 N. W. 119; *Bradley v. C., M. & St. P. R. Co.* 94 Wis. 44, 68 N. W. 410; *Hammond v. Sandwich Mfg. Co.* 146 Wis. 485, 131 N. W. 1097. Those

circumstances were such that in order to obtain the $13,000 on the property, the amount due on the land contract had to be provided, making it necessary to raise, in all, some $44,000.

The next complaint made is that the court erred in not holding as a matter of law that plaintiff and Utley made a complete settlement of all matters involved in the case, thereby discharging the surety.

It appears that on October 5, 1914, the last payment under the contract had not been made. Then, Mr. Patterson, acting for Utley and others, and Mr. Jacobson, president of respondent, acting for it, had some negotiations in respect to the differences between the two principals and, in the main, in regard to providing money to pay off lien claims on the building amounting to some $3,500. As a result of such negotiation, Patterson loaned respondent $3,500, which was used to provide for such claims, taking its note therefor and receiving a paper reciting that such note was received "for balance due under the contract and for extras" in constructing the building in question. There was much evidence given by Jacobson and Patterson in respect to this subject and evidence in relation to how the bookkeeper, by Patterson's direction, entered the matter on the Utley books. On the whole, the evidence tends, pretty persuasively, to show that, at the time the receipt was given, a full settlement of all the differences between the parties was intended, but, in view of the decision of the trial court, we are unable to reach the conclusion that error was clearly committed in submitting the matter to the jury. There was considerable evidence, not very satisfactory it is true, which, in a reasonable view, tends to show that the giving of the receipt was not for the purpose of a full settlement between Utley and respondent. It is needless to recite such evidence here. It has been read and reread and weighed in all reasonable aspects with the result that we are not persuaded to overrule the trial court. The

receipt itself, in view of the evidence, is not very satisfactory. Instead of stating that it was in full for all claims under the contract, it states that it was for balance due and for extras. That might well refer to the final payment of $3,000 and claims for extras, and have no reference to claims for damages for breach of contract. This view is consistent with, and rather suggested by, the provision of the contract that no payment "except the final payment shall be conclusive evidence of the performance of the contract or any part thereof, and no payment shall be construed to be acceptance of any defective work or materials." That seems to mean that the final payment, unexplained, would be conclusive evidence that the building had been constructed according to the plans and specifications except as to material used and defective work, not, necessarily, that such payment would preclude the owner from his remedy for failure to construct the building within the time agreed upon and for failure as to other provisions of the contract not having to do with the physical character of the building. Doubtless, under such a contract, the last payment could be made under such circumstances as to save the owner's rights, as in this case, where the payment is made by way of providing money to discharge lien claims on the property. Here there was no recovery for extras, so there is nothing contrary to the receipt in respect to that matter. There was a recovery for defective work, but the contract expressly provided that no payment should preclude claims being made therefor. The other elements of damage have nothing to do with the character of the building. They relate to failure to complete it within the time agreed upon and failures of Utley to protect the building from liens and to keep his agreement to loan respondent the $13,000 to take care of the two $5,000 notes and provide for the last payment of $3,000 agreed to be made on the contract.

It is a reasonable view of the evidence that the receipt was not intended to cover these matters; that it referred to the

$3,000 which was to be paid last and any claim for extras and nothing else, and was accepted to raise money to pay off lien claims on the property.

A further and last complaint is made in respect to the rejection of some evidence offered by appellants as to a conversation between respondent's president, Jacobson, and Utley, regarding extras. We are unable to see how that was prejudicial to appellants to the extent that the reception of the evidence might probably have changed the finding of the jury on the question of settlement. There was no basis in the evidence for a recovery for extras. There was no such recovery. The evidence had no bearing, and is not claimed to have had, except to show that there were matters of difference between the parties at the time of the negotiations leading up to the giving of the receipt. There is no doubt but what there were such matters. The rejected evidence had reference to extras only and the receipt covered that. Whether it was intended to cover all other matters of difference then existing, or that might arise under the contract, is another question and one upon which, as before indicated, we are unable to reach the conclusion that the trial court clearly erred in submitting the matter to the jury.

By the Court.—The judgment is affirmed.

COTZHAUSEN, Appellant, vs. ROCKSTEAD, Respondent.

October 25—November 14, 1916.

Sales: Automobiles: Failure to deliver: Recovery of down payment.

In an action to recover the amount paid on the purchase price of an automobile which plaintiff claimed the defendant had failed to deliver on ten days' notice, as provided in the contract, a general verdict for defendant is *held* to be sustained by evidence tending to show, among other things, that the contract had

been modified so as to call for a different model of car; that plaintiff afterwards demanded the model originally contracted for, the manufacture of which had been discontinued; that defendant was then unable to procure that car within ten days, but afterwards procured and offered one to plaintiff, who refused it; and that the contract provided that all dates of delivery were made without liability on defendant's part for delays from causes beyond his control.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This action was brought in the civil court of Milwaukee county, where judgment was rendered for defendant on general verdict of a jury. On appeal to the circuit court the judgment was affirmed without new trial, from which judgment this appeal was taken.

F. P. Hopkins, for the appellant.

F. F. Groelle, for the respondent.

KERWIN, J. The plaintiff on November 24, 1914, entered into a written contract for the purchase of a "Paige-Detroit Car, Model No. 36 Touring Car" and equipment for delivery on or about April, or after, 1915, on ten days' notice, for which he agreed to pay down $465 by way of delivery to defendant of one "Welch" winter body, the balance of purchase price, $750, to be paid upon delivery of the automobile. The contract of purchase also provided: "All dates of delivery are made without liability on our part for delays at the factory arising from strikes, fires, accidents, or other causes beyond the control of the manufacturers or *ourselves.*" On July 26, 1915, plaintiff requested that an automobile car as ordered be delivered to him within ten days. The defendant failed to deliver the car within the ten days.

The principal question in the case is whether the evidence was sufficient to support the verdict. There was an abundance of evidence that after the making of the contract of purchase the same was rescinded or modified so as to make

an agreement for another and different style of car, viz. a six-cylinder car, in lieu of the four-cylinder car contracted for. There was also sufficient evidence to entitle the jury to find that the defendant did not have and could not get an automobile such as the original contract called for between the time of the notice, July 26, 1915, and the time suit was commenced, and that plaintiff made no claim for any other automobile. Plaintiff testified on the trial that he would not take either a four-cylinder or a six-cylinder car. There is evidence that plaintiff knew the manufacture of the four-cylinder car, originally contracted for, had been discontinued before he made the demand, and it seems quite clear that he demanded the car at a time when he thought it could not be furnished within ten days. Defendant testified that he did not have on hand a No. 36 car at the time the notice was served, July 26th, but had offered to deliver one before that time and plaintiff had expressed his desire for a six-cylinder, and agreed to take a six and did not want the one contracted for. Plaintiff was informed as early as April, 1915, that the manufacture of No. 36 would be discontinued. There is evidence that plaintiff wanted a six-cylinder car, not a four, the price to be the same and the Welch winter body to be turned in in part payment of the six-cylinder car. The four-cylinder car was offered to plaintiff and he would not take it. The six was also offered him which he refused. There is evidence that he did not want the No. 36 because the price had gone down; that if he took any car it would be a six-cylinder. It is unnecessary to further recite the evidence. It is sufficient to say that it is ample to support the verdict.

Counsel make a point on defendant's answer wherein he says that he was and is ready and willing to deliver a car under the terms and conditions of his agreement. This allegation in the answer is supported by the evidence. While defendant had no reason to believe that plaintiff after agreeing to take a six-cylinder would ever call for a four, when demand was made for a four, at considerable trouble and ex-

pense he procured a four-cylinder and plaintiff refused to accept it.

Under the contract and circumstances of the case the jury were entitled to find that the defendant was guilty of no breach of contract. The original agreement, conceding it was in force when plaintiff made the demand, gave defendant such time beyond the ten days as he might be delayed by causes beyond the control of the manufacturer or himself, and there is sufficient evidence that he procured the No. 36 four-cylinder car in accordance with the terms of the original contract in view of the circumstances of the case and the plaintiff's statements.

The case was fairly presented to the jury and the verdict well supported by the evidence. We think the judgment below is right and that no prejudicial error was committed on the trial.

By the Court.—The judgment is affirmed.

DINAN, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY and another, Appellants.

October 26—November 14, 1916.

Street and interurban railways: Injury to man working on street: Contributory negligence: Degree of care required.

It is the duty of the ordinary traveler on a street to keep a vigilant lookout for approaching street cars; but a person who is lawfully performing work upon the street and the tracks of a street railway company with its knowledge, consent, or procurement is not bound to keep the same lookout as the ordinary traveler and may assume that the customary precautions will be taken by the company and the customary warnings given.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Personal injuries. Plaintiff was operating a steam roller rolling asphalt pavement which was being laid between the defendant's tracks on Grove street in Milwaukee, and was proceeding northward at a speed of about two miles an hour at the time of the accident. He had run the roller south just previously over the same strip and in so doing was facing south. He then turned and went northward. At the time of turning he looked southward and saw no car approaching. He traveled northward about 150 feet without looking south again, and then suddenly discovered that a north-bound car was within a few feet, coming rapidly, and immediately jumped from the roller and sustained serious injuries. The roller was about six or eight inches west of the west rail of the east track and the car struck it on its east side. The plaintiff claimed that the car was going at an excessive speed and that no warning of its approach was given. The jury by special verdict found that (1) the car was moving at the rate of about thirty miles per hour; (2) that this speed was excessive; (3) that it was want of ordinary care, (4) which was a proximate cause of the injury; (5) that the motorman failed to sound whistle or gong; (6) that this also was a want of ordinary care, (7) which was a proximate cause of the injury; (8) that the motorman in the exercise of ordinary care should have seen the roller in time to have stopped his car so as to avoid a collision; (9) that the motorman was guilty of want of ordinary care in failing to so stop his car, (10) which failure was a proximate cause of the injury; (11) that plaintiff was not guilty of contributory negligence; (12) that the roller did not turn northeasterly into the pathway of the car before the collision occurred; and (13) that plaintiff's damages were $1,575.

Upon this verdict judgment for the plaintiff was rendered in the civil court of Milwaukee county. Upon appeal to the circuit court the judgment was affirmed, and the defendants appeal from the judgment of affirmance.

For the appellants there was a brief by *Edgar L. Wood,* attorney, and *Bull & Johnson,* of counsel, and oral argument by *Mr. Wood.*

Oscar W. Kreutzer, for the respondent.

WINSLOW, C. J. We regard the evidence as entirely sufficient to sustain the findings of fact of the jury. No time will be spent in considering them. There is but one question arising on the trial which seems to us necessary to be treated, and that is the question whether the trial court erred in charging the jury on the eleventh question of the verdict relating to plaintiff's contributory negligence. Upon this subject the court charged in substance that it is the duty of the ordinary traveler on a street to keep a vigilant lookout for approaching cars, but that where a person is lawfully performing work upon the street and the tracks of the street railway company with its knowledge, consent, or procurement, the relationship is different, and that such a person is not required to keep the same lookout as the traveler who unnecessarily drives along the track, but may assume that the warnings and precautions customarily used by the company will be given. In connection with this charge, full and careful instructions were given to the effect that the plaintiff was required to keep a lookout for approaching cars and exercise ordinary care under all the circumstances, and that if he was guilty of a slight want of ordinary care which proximately contributed to his injury he must be found guilty of contributory negligence.

There is no error in this. It is not only good law but good sense. A man who is engaged in work upon the highway cannot, if he performs his duty, spend a large part of his time in looking for the approach of street cars or other vehicles. In a busy street he would accomplish little if he did so. Of course he cannot let his thoughts go wool gathering and expect all users of the highway to give place to him; he must

exercise some vigilance; he must keep that lookout for vehicles and cars which an ordinarily careful man similarly situated would keep; a man who is compelled to be in the street and to be giving attention to his work. Such care must manifestly be a lesser degree than the care required of a person who is on the highway for the purpose of travel alone and may come and go at will. This court has affirmed the principle in *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, and other courts have adopted the same rule. *Graves v. Portland R., L. & P. Co.* 66 Oreg. 232, 134 Pac. 1; *Lewis v. Binghamton R. Co.* 35 App. Div. 12, 54 N. Y. Supp. 452. See 2 Thomp. Comm. on Neg. § 1463. There are decisions which seem to favor a contrary doctrine, but we decline to follow them.

A motion for new trial on the ground of newly discovered evidence was denied by the trial court and the ruling is alleged as error. We have carefully considered this contention, but find no error. It is not deemed necessary to go into the matter at length.

By the Court.—Judgment affirmed.

MILWAUKEE STEEL TYPE & DIE COMPANY, Respondent, vs. AMERICAN CENTRAL INSURANCE COMPANY and others, Appellants.

October 26—November 14, 1916.

Jurors: Excuse by court: Waiver of errors in selection: Evidence: Competency: Harmless error: Instructions to jury: Fire insurance: Proofs of loss as evidence: Costs: Taxation: Defendants united in interest treated as one party.

1. Independently of sec. 2849, Stats., the circuit court may in its discretion excuse a juror because his relations to either party to the action are such as would be liable to operate prejudicially in the case.

2. Failure to object to the collected jury before they are finally sworn is a waiver of any precedent error in their selection.
3. The admission of incompetent evidence is not a prejudicial error where, even if it had been excluded, the jury would in all probability have reached the same result.
4. A trial court may, in charging the jury, call to their attention the evidence produced on both sides, and even speak of the effect of the evidence as given on one side, and the effect of that given on the other, when such effect is clear, leaving it for the jury to determine where the truth lies; and in so doing there is no infraction of the rule that the court should not suggest what is established as to any controverted matter.
5. In an action upon insurance policies the charge to the jury is *held* not to have carried the idea that the proofs of loss were evidence of loss or damage.
6. The six defendants who issued the insurance policies in suit having joined in answering the complaint, and the cause having been treated throughout as one in which they were united in interest, all being represented by the same attorneys and the cause submitted to this court on one printed case and one brief on each side, all will be treated as one party for the purpose of taxing costs in this court, although each defendant separately appealed.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action to recover on six insurance policies issued to plaintiff by defendants, insuring the former against loss by fire on property consisting of implements, models, patterns, and other property for use, and in use, by plaintiff in its manufacturing business in Milwaukee, Wisconsin. Each of the defendants issued a policy to the plaintiff, permitting co-insurance.

Plaintiff claimed the insured property was damaged by fire to the extent of $23,782.22 on May 9, 1915, and that the sound value of such property at the time of the fire was $28,703.99.

The defendants joined in an answer putting in issue the title to the property, the sound value thereof, and the damage.

The cause was submitted to a jury for a special verdict, resulting in findings in plaintiff's favor as to the title and fixing the damages on the property described in the proof of loss at $19,500.

Defendants claim that the property formerly belonged to L. E. Larson Company of Chicago, an Illinois corporation, and was never conveyed to the plaintiff. That subject on the evidence was covered by four special findings, as follows: The machinery described in Exhibit 1–A was not the machinery formerly used and owned by the L. E. Larson Company in Chicago. The material described in Exhibit 1–A was not formerly used and owned by the L. E. Larson Company in Chicago. The patterns described in Exhibit 1–A were not formerly owned by the L. E. Larson Company.

Judgment was rendered for $19,500 and interest, the same being divided between the six defendants according to their respective liabilities under the policies, one sixth of the costs being awarded against each defendant.

The defendants separately appeal.

The cause was submitted for the appellants on the brief of *Gill & Barry,* and for the respondent on that of *Schmitz, Wild & Gross.*

MARSHALL, J. The court, on its own motion, excused a juror who was called, upon it appearing that he was the local agent for one of the defendants. They objected to such excusal.

The claim is made that the court had no right to excuse the juror because no challenge was made upon the ground that such juror did not stand indifferent to the cause and no ground appeared calling for the excuse under sec. 2849 of the Statutes. Independently of the statute, it is competent for the court, in its discretion, to excuse a juror because his relations to either party to the action are such, or some cause exists, which would be liable to operate prejudicially in the

case. *Sutton v. Fox,* 55 Wis. 531, 13 N. W. 477. Furthermore there does not appear to have been any objection made to the collected jury before they were sworn, which operated as a waiver of any precedent error, if there were any. *Cornell v. State,* 104 Wis. 527, 80 N. W. 745; *Emery v. State,* 101 Wis. 627, 78 N. W. 145.

Complaint is made because of some evidence which the court permitted to be introduced respecting the value of property destroyed. All the proof on that subject has been examined, resulting in a conclusion that no prejudicial evidence was improperly allowed over objection. It is not thought necessary to refer thereto in detail. The real question involved was submitted to the jury, understandingly, to find the fact on all the evidence bearing on the subject and it does not seem probable, even if the particular evidence complained of had been excluded, that any different result would have been reached. There was much evidence, as to value, received, of a perfectly legitimate character and seems not to have been controverted by anything produced by appellants.

Error is assigned because the court refused to direct a verdict in favor of defendants upon the ground that the evidence showed that the insured property at one time belonged to L. E. Larson Company, and there was no proof showing that such company ever authorized a conveyance thereof to the respondent. The jury found specially that the property was not formerly owned by the L. E. Larson Company and there was ample evidence tending to establish the facts found in that respect, therefore the motion for a directed verdict was properly denied.

In submitting the question as to whether machinery described in Exhibit 1–A was machinery formerly used and owned by L. E. Larson Company of Chicago, the court said:

"It is contended, and evidence has been given to that effect by Larson, that the property of the company was, a great deal, or most of it, destroyed by fire and that what was left was

some machinery, and that the machinery was afterwards sold and the proceeds of it used for payment of the debts of the corporation, and thus all of the property of that corporation wiped out."

Complaint is made of that upon the ground that the court laid emphasis upon the fact that Larson had so testified and that it was, in effect, saying to the jury that the property of the company, or a great deal of it, was destroyed by fire. The court at this point merely stated the evidence as contended on the part of the plaintiff and the effect of it if true. The jury must have so understood the matter. The statement was followed by one as to the evidence as contended by defendants, and the question was left to the jury to find the fact upon the whole evidence.

A trial court may, in submitting a controversy to a jury, call to their attention the evidence produced on both sides, and even speak of the effect of the evidence as given on one side, and the effect of that given on the other, when such effect is clear, leaving it for the jury to determine where the truth lies. In so doing there is no infraction of the rule that, in giving instructions, the court should not suggest what is established as to any controverted matter. There was nothing in the charge in this case prejudicially out of harmony with anything said in *Kamp v. Coxe Bros. & Co.* 122 Wis. 206, 99 N. W. 366, or *Gussart v. Greenleaf S. Co.* 134 Wis. 418, 114 N. W. 799, or any other case.

Further complaint is made that the court, in submitting the question as to the damage to the property described in the proofs of loss, so instructed the jury as to carry the idea to them that such proofs were evidence of value and damage. It does not seem so. The question was carefully explained, the proofs being referred to as containing a list of the property. Nothing was said in the charge, as we read it, intimating that such proofs were evidence on the ultimate fact to be determined. The court particularly referred to there

being much proof as to the amount of property and its value, and as to the total destruction of property and partial injury to property, and that the question required a finding as to the damage to the property described in the proofs of loss. Taking the charge as a whole, it is considered that the jury did not understand from anything the court said that the proofs of loss were evidence of loss or damage.

Some other complaints are made in respect to the instructions, but none which seem to merit special mention or discussion. The case seems to have been fairly tried and submitted to the jury and a conclusion reached without prejudicial error.

The defendants having joined in answering the complaint, and the cause having been treated, all the way through, as one, in which the defendants were united in interest, all being represented by the same attorneys, and the cause submitted to this court on one printed case, and one brief on each side, all defendants will be treated as forming one party for the purpose of taxing costs in this court, though defendants separately appealed, one sixth of the total taxed to be awarded against each defendant, as in the court below.

By the Court.—The judgment is affirmed, costs to be taxed as indicated in the opinion.

STATE EX REL. BODDENHAGEN, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, and another, Respondent.

October 27—November 14, 1916.

Statutes: Special law: Repeal by general act: Conflict: Viaducts: Duty of railway company to "maintain:" Rebuilding.

1. Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together.
2. Ch. 51, Laws 1878, requiring the defendant railway company to erect and maintain a certain viaduct or bridge in Milwaukee county carrying a highway over its tracks, was not repealed by sec. 1797—12*e*, Stats. (Laws 1909, ch. 540), relating to railroad highway crossings, nor by sec. 2 of said ch. 540, expressly repealing conflicting acts,—the act of 1878 not conflicting in any way with the act of 1909 or with the exclusive exercise of the jurisdiction conferred by the latter act upon the railroad commission.

[3. Whether upon the passage of ch. 51, Laws 1878, a cause of action accrued in favor of Milwaukee county and every member of the public affected thereby against the defendant to compel the maintenance of the viaduct after its erection, which cause of action, since it existed prior to the passage of ch. 540, Laws 1909, could not be abrogated even if said ch. 540 operated to repeal the act of 1878, is not decided.]

4. The defendant railway company being required by ch. 51, Laws 1878, to "erect and maintain" the viaduct in question, the fact that it was wrongfully broken down by the negligence of a person who ran a steam shovel over it is immaterial so far as the duty of defendant to maintain it is concerned.
5. The word "maintain," with reference to a viaduct, includes keeping up, preserving, and rebuilding in case of destruction.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action of *mandamus* to compel appellant, *Chicago, Milwaukee & St. Paul Railway Company,* to rebuild so much of a bridge or viaduct built under ch. 51, Laws 1878, as carried the Blue Mound road in Milwaukee county over appellant's

railroad. The action was originally brought against the railway company and afterwards the county of *Milwaukee* was made a party defendant.

Findings and conclusions in favor of petitioner were made in the circuit court to the effect that the said petitioner was entitled to recover and that the defendant *Milwaukee County* was entitled to maintain its cross-complaint against the defendant *Chicago, Milwaukee & St. Paul Railway Company* to compel it to restore the viaduct over its tracks and to maintain the same in accordance with the provisions of ch. 51, Laws 1878.

The *Chicago, Milwaukee & St. Paul Railway Company* appealed to this court and assigns error (1) in holding that ch. 51, Laws 1878, was not repealed by sec. 1797—12*e*, Stats., and (2) that the court erred in holding that ch. 51, Laws 1878, applied to appellant after the viaduct was broken down by negligence on the part of a member of the public.

For the appellant there were briefs by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Killilea.*

For the respondent *Boddenhagen* there was a brief by *O. W. Bow* and *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *Mr. Bow.*

For the respondent *Milwaukee County* there was a brief by *Winfred C. Zabel,* district attorney, and *William L. Tibbs* and *Daniel W. Sullivan,* assistant district attorneys, and oral argument by *Mr. Sullivan.*

KERWIN, J. 1. Ch. 51, Laws 1878, required the appellant to "erect and maintain" the viaduct or bridge in question at the crossing of the Milwaukee and Blue Mound road, commonly called Spring street road, over its tracks, said road at said point being a county road. The respondent *Milwaukee County* was required by the terms of said ch. 51, Laws 1878, to cause to be constructed and erected during the year 1878 a suitable and convenient approach to the viaduct as

specified in the act, connecting said viaduct approach with the said bridge and cause the highway to be opened and improved and levy a tax sufficient to pay the county's portion of the costs and damages of the improvement mentioned in said act.

The court below found upon sufficient evidence that both the *Chicago, Milwaukee & St. Paul Railway Company* and the county of *Milwaukee* complied with said ch. 51, Laws 1878, and built a viaduct and approaches thereto as provided in said law and maintained the same until July, 1912; that in July, 1912, the western portion of said viaduct was broken down by the weight of a steam shovel which was being drawn across it; that thereafter said railway company removed the broken parts of said viaduct and has since refused to replace or maintain the same and by reason thereof said road was rendered impassable; that the county of *Milwaukee,* as required by ch. 51, Laws 1878, at large expense duly raised the grade of said road to conform to the grade of said bridge or viaduct and constructed and erected approaches to said bridge as required by said act, and at the time of the breaking of said bridge the county of *Milwaukee* was maintaining suitable approaches to said bridge or viaduct in accordance with said ch. 51, which approaches had been maintained by said county since the construction thereof, and said county has been ready and willing at all times to maintain the same as required by said act; that said road has been rendered impassable and dangerous by reason of the failure of said railway company to maintain the portion of said bridge which it is required by said act to maintain; that said road is a county highway and required to be repaired and maintained at the expense of the county; that public safety requires that the bridge or viaduct across the right of way of said railway company through the Menomonee valley and the approaches thereto be restored and maintained in conformity with ch. 51, Laws 1878.

The contention that sec. 1797—12*e*, Stats., repeals ch. 51, Laws 1878, we think cannot be sustained. These statutes are not repugnant and there is no specific repeal of said ch. 51. True, sec. 1797—12*e* came into existence by ch. 540, Laws 1909, sec. 2 of which provides that "All acts or parts of acts conflicting with the provisions of this act or with section 1792—12*d*, or with the exclusive exercise of the jurisdiction herein and hereby conferred, or conferred by section 1797—12*d*, are hereby repealed."

Counsel for appellant relies strongly upon *Milwaukee v. Railroad Comm.* 162 Wis. 127, 155 N. W. 948. It was held in that case that ch. 540, Laws 1909, operated to amend all previous provisions on the subject in city charters, railroad charters, or general statutes of the state. There is no conflict between ch. 540, Laws 1909, and ch. 51, Laws 1878. Nor does said ch. 51 in any manner conflict with the exclusive exercise of the jurisdiction conferred by ch. 540, Laws 1909. The repealing clause before cited only repeals conflicting provisions. Moreover, sec. 4987, Stats., provides that no general provisions of the statutes shall be construed to repeal any special acts relating to particular counties, towns, cities, or villages unless such special acts are enumerated in the acts repealed.

This court has repeatedly ruled that where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 144 Wis. 386, 395, 129 N. W. 623, and cases cited.

It is also insisted by counsel for respondents as a further ground for affirmance that upon the passage of ch. 51, Laws 1878, a cause of action accrued in favor of *Milwaukee County* and every member of the public affected thereby against the railroad company to compel the maintenance of the viaduct after its erection, and that this cause of action existing prior to the passage of ch. 540, Laws 1909 (sec.

1797—12*e*, Stats.), could not be abrogated even if said ch. 540 operated to repeal ch. 51, citing sec. 4974, Stats., and *Superior v. Roemer,* 154 Wis. 345, 141 N. W. 250. Whether this contention is well made or not we need not decide, because we are convinced that said ch. 51 was not repealed.

2. The contention under the second assignment of error to the effect that ch. 51 does not apply to the viaduct after it was broken down by negligence of a member of the public, cannot be sustained. Whether the viaduct was wrongfully broken down by a person who ran a steam shovel over it or not is immaterial so far as the duty of the railway company to maintain the viaduct is concerned. The railway company assumed the obligation to erect and maintain the viaduct. The word "maintain" has a well defined meaning and includes keeping up, preserving, and rebuilding in case of destruction. *Benson v. New York,* 10 Barb. 223; *Kendrick & Roberts v. Warren Bros. Co.* 110 Md. 47, 72 Atl. 461; *Louisville & N. R. Co. v. U. S. I. Co.* 118 Tenn. 194, 101 S. W. 414. We are satisfied that the judgment below is right and should be affirmed.

By the Court.—Judgment affirmed.

PFINGSTEN, Respondent, vs. PFINGSTEN, imp., Appellant.

October 27—November 14, 1916.

Married women: Separate estate: Divorce: Adultery of wife: Division of property derived from her husband: Statutes: Construction.

1. Under sec. 2342, Stats., a wife may take title to property from her husband and hold it as her sole and separate estate; and under sec. 2372, no judgment of divorce can affect her right to such estate, nor can the court in such action divest her title thereto, except upon a division of property between the parties as provided in sec. 2364.

2. Under sec. 2364, Stats., alimony cannot be allowed to a divorced wife where the divorce is granted on the ground of adultery committed by her, but the division and distribution of property therein provided for may be made even though the divorce be granted for said cause.
3. In construing a statute the legislative purpose must prevail so far as it can be gathered from the language of the law by any reasonable construction.
4. When the literal meaning of a statute, though apparently plain and unambiguous, is absurd or unreasonable, ambiguity arises, the presumption being that such literal meaning does not correctly voice the legislative purpose.
5. When ambiguity or obscurity exists in a statute, the court may look to its history, to all the circumstances intended to be dealt with, to the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words, or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with or even contradict the letter of the enactment.
6. A thing which is within the intention of the lawmakers and by rules of construction can be read out of it, is as much within the statute as if it were there within the letter.
7. In construing a statute the revisers' notes may properly be referred to in determining the legislative intent.
8. In combining secs. 24 and 29, ch. 111, R. S. 1858, in sec. 2364, R. S. 1878, there was no intention to lessen the powers of the court in respect to property matters, or to preclude a division and distribution of estate as therein provided even when the divorce was granted for adultery of the wife.
9. In view of the history of the statute and the unreasonableness or absurdity of a contrary construction, it is *held* that the words "excepting that of adultery committed by the wife" in sec. 2364, Stats., do not reach forward and condition the clause commencing "or the court may finally divide," and that in said clause, between the words "the court" and the words "may finally divide," the words "in any case where alimony is not adjudged" may be read as in place by reasonable inference.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed in part.*

Action for a divorce on the ground of adultery of the wife. The plaintiff prevailed in the action. There was a ques-

tion of what should be done with the property possessed by the parties and what provision, if any, should be made for the guilty wife. There was a homestead valued at some $13,000, subject to a mortgage for $3,500, and a further mortgage to Adolph Kanneberg, defendant's lawyer, as security for his fees in this action and other matters. There was also some household furniture of a replacement value of some $3,500, and other personal property. There were no living children.

The court found that the wife was guilty of repeated acts of adultery, as charged in the complaint; that the household furniture was plaintiff's property and that the title thereto was in him, though the articles were in storage in the name of the wife; that the homestead property and some $2,000 worth of jewelry, possessed by the wife, were derived wholly from plaintiff; that she obtained a deed of the homestead from him in August, 1907; that it was subject to incumbrances to the amount of $3,500, for which he was liable, and there was a second mortgage of $5,000 given February 16, 1915, to her attorney, who received the same with full knowledge of the property having been wholly derived from plaintiff. The court further found that such attorney had performed services for her of the value of $700, and paid expenses in her behalf to the amount of $176.41.

On such findings the court held that plaintiff was entitled to judgment of divorce on the ground of the adultery of the wife; that she was not entitled to any alimony, or any part or portion of the property described; that the whole thereof should be treated as belonging to plaintiff and the title thereto, so far as vested in her, should be divested and vested in him. The court further concluded that the mortgage to the attorney should be declared null and void and he be required to release it of record; but that plaintiff should pay him $876.41. Judgment was so ordered and rendered. *Mrs. Pfingsten* appealed but Mr. Kanneberg did not.

Adolph Kanneberg, for the appellant.

For the respondent there was a brief by *Curtis & Mock,* and oral argument by *H. K. Curtis.*

MARSHALL, J. The main question on this appeal is whether, where a divorce is granted on the ground of adultery of the wife, the court is without power to make a division of property between the parties, but may, nevertheless, divest the wife of the separate estate which she has derived from the husband and transfer it to him.

That a wife may take title to property from her husband and hold it as her sole and separate estate is provided by sec. 2342, Stats. In that respect, the written law has been changed since *Kinney v. Dexter,* 81 Wis. 80, 51 N. W. 82, as counsel for appellant suggests. So there can be no question but what the real estate and other property respondent conveyed to appellant during their married life became her property, subject only to such power in respect thereto as can be found in the divorce statute, sec. 2364. That would, doubtless, be so without any express provision of law on the subject, but it is covered by sec. 2372, Stats., which provides that:

"No judgment nullifying a marriage or for a divorce of any kind shall in any way affect the right of a wife to the possession and control of her separate property, real or personal, except as provided in this chapter; and nothing contained in this chapter shall authorize the court to divest any party of his title in any real estate further than is expressly provided herein."

In the face of that statute, we must hold that the trial court erred in concluding, as seems to have been the case, that it did not have jurisdiction to either award alimony to appellant or to make a division of property between the parties, and yet holding that it had authority to divest her of all property derived from respondent and vest it in him. The statute, as will be seen, only provides for so dealing with property in

case of a division thereof between the parties. Where there is no warrant for such division, the feature of the statute, in respect to dealing with the wife's property derived from her husband, as part of the entirety to be distributed, has no vitality whatever. On that, let the statute (sec. 2364) speak for itself:

". . . the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, between the parties and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties and all the circumstances of the case; . . ."

The power, as regards division of property, is wholly a creature of the statute. The authority to take title from one and vest it in the other is dependable upon the express power to make a property distribution. For that the estate of the wife derived from her husband is regarded as his, but not otherwise. *Bacon v. Bacon,* 43 Wis. 197. The language "the court may finally divide and distribute the estate, . . . and divest and transfer the title of any thereof accordingly," very clearly means "the court may finally divide," etc., in which case may, if any, "divest and transfer the title of any thereof accordingly." There is nothing ambiguous about that language, therefore it must be taken as it reads.

It follows that it was erroneous and illogical to hold that there could be no division of property in case of a divorce from the wife on account of her adultery and yet her separate property could be taken from her and given to the husband because she acquired it from him.

We now turn to the main proposition in the case. Did the court below correctly read the statute in holding that it prohibits allowance of either alimony or a division of property in such circumstances as existed in this case?

That the allowance of alimony to a divorced wife is made conditional upon her fault not being that of adultery, is plain; but do the words "for any cause excepting that of adultery committed by the wife" also make the provision for a division of property depend upon the divorce not being granted because of such fault? That the condition is absolute as to alimony is not only clear from the statute, but has been so held from an early day. *State ex rel. Child v. Smith,* 19 Wis. 531. That the language of the statute, in its literal sense, covers both situations must be admitted, but often such sense does not correctly voice the legislative purpose. That must prevail in every case, so far as it can be gathered from the language of the law, by any reasonable construction thereof. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 85, 117 N. W. 846. True, the plain mandate of a law must prevail even though it appear unreasonable, *Rowell v. Barber,* 142 Wis. 304, 125 N. W. 937; but whether the mandate is plain must often be determined with reference to "effects and consequences."

A statute may be plain and unambiguous in its letter, and yet, giving it the meaning thus suggested, it may be so unreasonable or absurd as to involve the legislative purpose in obscurity. *Rice v. Ashland Co.* 108 Wis. 189, 84 N. W. 189. In such case, or when obscurity otherwise exists, the court may look to the history of the statute, to all the circumstances intended to be dealt with, to the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words, or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with, or even contradict, the letter of the enactment. A thing which is within the intention of the lawmakers and by rules for construction can be read out of it, "is as much within the statute as if it were within the letter." *School Directors v. School Directors,* 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049; *Neacy v.*

Milwaukee Co. 144 Wis. 210, 128 N. W. 1063; *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 9, 128 N. W. 1041; *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216, 150 N. W. 542.

The cases referred to illustrate the extent of judicial license often and necessarily exercised in order to carry out the legislative purpose. It should never be used to make a law, but may go to the furthest extent indicated, and must in some cases, in order to prevent the real legislative will from being defeated.

In the light of the foregoing as to how ambiguity may appear and how it may be solved, let us look at the reason of the statute.

The difference between the nature of alimony, and a division of property, furnishes a strong reason why the legislature must have intended to make the former absolutely conditional upon the fault of the wife not being adultery, and not so the latter. The doctrine of alimony is very ancient. It is grounded on the natural obligation of the husband to support the wife which is not, necessarily, in a moral sense, regardless of written law, wholly removed by a judicial separation. It is said to have been recognized long before there was any statute on the subject, though, as this court has said before, permanent alimony is wholly a creature of the written law. That commonly, as here, provides therefor as to the divorced wife but not as to the divorced husband and the power of the court is restricted accordingly. *Brenger v. Brenger,* 142 Wis. 26, 125 N. W. 109.

Since the basis for alimony is as indicated, it is most natural that the legislature should have considered, as commonly is the case, that a divorce for such gross misconduct as that of adultery of the wife ends all moral obligation to her and should absolutely terminate all legal obligation for her future support. In general, such duty is continuous. It does not rest, necessarily, on possession of property and is not limited

by financial circumstances existing at the time of the divorce, nor does jurisdiction of the court over the subject end with the provision in the divorce judgment. That may be revised, from time to time, as justice seems to require, the continuity of the obligation to support being the foundation of it. So the legislature expressly provided that the obligation to support the wife, should not necessarily terminate with the separation except in case of the divorce being granted upon the ground of her adultery.

The provision for a division of property does not wholly rest on the obligation stated; but rests, largely, upon the fact that, in many cases, the property possessed by the parties is the result of their joint efforts, so that, equitably, a part of it should go to each, not excluding the wife, necessarily, because of her fault being adultery. The division may be made according to the equities of the case, as regards the origin of the possessions, and the relations between the parties be completely ended as in case of a separation without any jurisdiction to award alimony.

Since, as we have heretofore said, no part of a wife's property which the husband had voluntarily settled upon her during their married life could be restored to him by the court upon a divorce being granted for her fault, unless the statute expressly so provided, 14 Cyc. 591; and statutes, in general, do not so provide and ours does not, except as the same is involved in the provision for a division of property, it seems that the legislature may have intended such provision to be general; affording the court a broad discretion so that, where justice requires it, especially in case of the property possessed by the parties being the result of their joint efforts, or the title thereto being vested in one of them but being derived from the other, the whole situation may be dealt with. That idea seems to be embodied in the closing words of the section: "having always due regard to the legal and equitable rights of each party, the ability of the husband, the special

estate of the wife, the character and situation of the parties and all the circumstances." This broad field covers much which could not reasonably, in all cases, deprive the guilty wife, entirely, of any share in the estate possessed by the husband, including that acquired by him from the wife, and the estate derived by the latter from the former. Otherwise, though the husband might have a large estate derived from the wife, there would be no power to award any of it to her and, though the wife might have a large estate, derived from him, the court would be powerless to award him any of it.

It is not difficult to appreciate that a construction of the statute which would necessitate such a result as the one above suggested would, or might, cause great injustice in many cases. Not only the wife might have acquired title to the greater part, or even all, of the joint accumulations of the parties during their married life, and the greater part, or all, as well, of his prior possessions and property derived from sources other than the efforts of either party; but the husband might be likewise circumstanced. The guilt of the wife might be characterized by many palliating circumstances, and yet she could be cast out into the world a most pitiable object of charity, or, on the other hand, her guilt might be characterized by the most aggravating circumstances, and yet she could go free and her unfortunate husband be left, practically, irremediably robbed of the fruits of years of his labor and his property otherwise acquired as well. Would not a construction of the statute which would, or might, produce such results be highly absurd? Would it not shock one's conscience to be forced to the conviction that the legislature intended any such thing? It seems so and that is enough to render the statute ambiguous, though obscurity of meaning be not otherwise disclosed, and call upon us to endeavor, industriously, to read, reasonably, out of it some other meaning without "violating the rules of language or of law."

There is no more useful rule for perceiving obscurity of meaning in a statute than the one that, while ambiguity is an absolute condition of construction, such condition exists when the literal meaning is absurd or unreasonable, for it is always to be presumed, until the contrary unmistakably appears, that the legislature did not so intend. *In re Reeseville D. Dist.* 156 Wis. 238, 240, 145 N. W. 671. To seek by all rules of construction to avoid such a result does not violate the doctrine of *State ex rel. Monroe Co. v. Vernon Co.* 148 Wis. 274, 278, 134 N. W. 360; and *Schenck v. Sterling E. & C. Co.* 151 Wis. 266, 271, 138 N. W. 637, 769, and similar cases, that it is not the function of courts to supply omissions, or correct mistakes, or make or amend a statute to avoid or produce a particular result. It is one thing to do that and quite another to discover and effectuate the legislative words. If unreasonableness can create ambiguity, it would seem that we have it, manifestly, in the literal sense of the statute before us. Read as the trial court viewed it, it would be a most inhumane enactment. Hope is held out to the worst of criminals, by divine as well as man-made law, but the idea, advanced here, is that the legislature left for the guilty wife no hope whatever, regardless of circumstances, and that means, no hope whatever for the innocent husband as regards property matters, in the circumstances of this case.

We will now turn to the history of our divorce statute. That will throw some light on the question to be solved. Counsel for appellant has, with commendable industry, brought such history fully to our attention.

The territorial statute of 1839, at p. 140, § 4, is the beginning of our written law on the particular subject. It provided that, in case of a divorce for adultery of the wife, all personal estate should go absolutely to the husband, and the real estate of the wife should also so go for "life, in case they have had issue born alive of her body during the coverture,

otherwise during her natural life only, if he shall survive her. Provided, nevertheless, that the court may allow for her sustenance so much out of the personal or real estate, as they shall judge necessary." Thus, it will be seen, the real estate of the wife, whether derived from the husband or not, was not absolutely taken from her, and ample discretion was vested in the court to provide for her, equitably, out of the personal and real estate as well.

By the Revised Statutes of 1849, the written law, ch. 78, secs. 24 and 29, took this form:

"Sec. 24. Upon every divorce from the bond of matrimony, for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board from any cause, if the estate and property restored or awarded to the wife, shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, or if there be no such estate and property, the court may further decree to her such part of the personal estate of the husband, and such alimony, out of his estate, as it shall deem just and reasonable, having regard to the ability of the husband, and the character and situation of the parties, and all the other circumstances of the case."

"Sec. 29. The court shall in all cases, subject to the provisions of this chapter, regulate the division and distribution of the estate, real and personal, between the parties, and the allowance for alimony to the wife, or to her and the minor children committed to her care and custody, according to equity and good conscience, having always due regard to the legal and equitable rights of each party, but nothing contained in this chapter shall authorize the court to divest any party of their title to or interest in any real estate, further than is expressly specified herein."

Thus it will be seen, as pointed out by counsel for appellant, that, notwithstanding a divorce for adultery of the wife and want of power in that case to award her alimony, power was recognized as yet existing to restore and award property to her. The statutes of 1849, without change, became

secs. 24 and 29, ch. 111, of the Revised Statutes of 1858. Such sections with sec. 21 of such chapter were in this form:

"Section 21. Whenever a nullity of a marriage, or a divorce from the bond of matrimony, for any cause excepting that of adultery committed by the wife, shall be adjudged, and when the husband shall be sentenced to imprisonment for life, and also upon every divorce from bed and board, the wife shall be entitled to the immediate possession of all her real estate in like manner as if her husband were dead."

"Section 24. Upon every divorce from the bond of matrimony, for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board for any cause, if the estate and property restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself, and such children of the marriage as shall be committed to her care and custody, or if there be no such estate and property, the court may further adjudge to her such part of the personal estate of the husband, and such alimony out of his estate, as it shall deem just and reasonable, having regard to the ability of the husband and the character and situation of the parties, and all the other circumstances of the case."

"Section 29. The court shall, in all cases subject to the provisions of this chapter, regulate the division and distribution of the estate, real and personal, between the parties, and the allowance for alimony to the wife, or to her and the minor children committed to her care and custody, according to equity and good conscience, having always due regard to the legal and equitable rights of each party; but nothing contained in this chapter shall authorize the court to divest any party of their title to or interest in any real estate, further than is expressly specified herein."

By the revision of 1878, the law took this form, as it now stands:

"Section 2364. Upon every divorce from the bond of matrimony, for any cause excepting that of adultery, committed by the wife, and also upon every divorce from bed and board, the court may further adjudge to the wife such alimony out of the estate of the husband, for her support and maintenance,

and such allowance for the support, maintenance and education of the minor children committed to her care and custody, as it shall deem just and reasonable, or the court may finally divide and distribute the estate, both real and personal, of the husband, and so much of the estate of the wife as shall have been derived from the husband, between the parties, and divest and transfer the title of any thereof accordingly, having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case; but no such final division shall impair the power of the court, in respect to revision of allowances for minor children, under the next preceding section."

"Section 2372. No judgment nullifying a marriage, or for a divorce of any kind, shall in any way affect the right of a wife to the possession and control of her separate property, real or personal, except as provided in this chapter; and nothing contained in this chapter shall authorize the court to divest any party of his title in any real estate, further than is expressly provided herein."

The revisers' notes, which may properly be referred to in determining the legislative intent, inform us that the purpose of sec. 2364 was to combine secs. 24 and 29, ch. 111, of the Revised Statutes of 1858, and the purpose of sec. 2372 was to supersede sec. 1 of such chapter, and partly, to embrace the last part of sec. 29 thereof, and limit power to transfer title in actions for divorce to that bestowed in the chapter on that subject.

Referring to the note to sec. 2372, there is nothing found in sec. 1, ch. 111, of the old statutes which is embodied in the new one. It was practically dropped out as unnecessary. The new section embraced, substantially, all the former sec. 29, commencing with the words, "But nothing contained in this chapter," etc., thus confining the power to divest and vest title in divorce actions to the provision in sec. 2364.

Turning to sec. 2364, it will be seen to contain, substantially, the provisions of the former sec. 29 in relation to alimony, also in relation to the maintenance and education of

children and to the distribution of property "having regard to the ability of the husband and the character and situation of the parties, and all the other circumstances of the case," those words being changed, evidently, without any purpose to substantially change the meaning, to this form, "having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case."

On the whole, it seems quite evident that there was no purpose to make any change in the former statute by the revision of 1878 which would give the court less power in respect to property matters than it formerly possessed, which included power, as we read the old statute, sec. 29, to "regulate and distribute the estate, real and personal, of the parties" "subject to the provisions of this chapter" which did not preclude the restoration or awarding of property, in any case, to the divorced wife. In the face of the evident purpose of the revisers and the legislature to combine in sec. 2364 substantially what was in the former secs. 24 and 29, it cannot be that there was any thought of cutting the divorced wife off entirely as to property matters, in case of the separation being adjudged for adultery on her part. Probably the purpose was to make that plain which was somewhat involved before and to make a general provision for the distribution of property, in the discretion of the court, so as to, more effectually than before, protect "the legal and equitable rights of each party" considering "the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case."

Our conclusion is that the words "excepting that of adultery committed by the wife" do not reach forward and condition the clause commencing with the words "or the court may finally divide," etc.; that the unreasonableness of the opposite view, in the light of the history of the matter, should be deemed not to have been within the legislative intent. As we

have heretofore said, whatever is within the intent of the lawmakers and can, by rules for construction, be read out of the legislative language, is as much within the words of the law as if literally there expressed. To so read such intent therefrom, as we have heretofore said, words may be rejected which were obviously improperly used, or be read entirely outside of their literal scope, *Att'y Gen. v. West Wis. R. Co.* 36 Wis. 466, and words may be transposed, or read in place where there by reasonable or necessary inference.

Many illustrations of the foregoing are given in *Neacy v. Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063, before cited. It was there said, supported by abundance of authority and guarding the principle that the court cannot, properly, make the law by construction: "Words necessary to be supplied should be deemed to be in place by necessary or reasonable implication, and words necessary to be displaced, so far as evidently inadvertently used, to bring out the sense manifestly intended should be regarded as surplusage, and words necessary to be transposed to that end should be given their proper place, all by familiar rules for judicial construction;" and, quoting approvingly from a standard text-writer, further said: "The judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention, and that his amendment probably does." It is appropriate to thus refer here to the broad scope of judicial power in the field of interpretation and construction, even at the expense of some repetition.

It seems that, in the section under discussion, the words, "in any case where alimony is not adjudged" may be read as in place by reasonable inference between the words "the court" and the words "may finally divide," etc., so that the

subject of division of property will have the appearance of having been dealt with independently, instead of being tied back to the words "for any cause excepting that of adultery of the wife."

So treating the statute it would read, "Upon every divorce from the bond of matrimony for any cause excepting that of adultery committed by the wife," etc., "the court may further adjudge to the wife such alimony," etc.; "or the court may" in any case where alimony is not adjudged "finally divide and distribute the estate, both real and personal, of the husband, and so much of the estate of the wife as shall have been derived from the husband, between the parties, and divest and transfer the title of any thereof accordingly, having always due regard," etc.

So reading the statute, it is relieved from the otherwise unreasonable or absurd character and made to harmonize with the previous history of the divorce laws. It affords the court somewhat more latitude than formerly, in harmony with the progressive tendency to deal humanely and charitably with erring women and unfortunates of either sex. It gives proper vitality to the words, "having always due regard to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case."

The reasons advanced by counsel for respondent in support of the judgment complained of, though not specially referred to, have had due attention. They are all, in substance, covered by what has been said. Their infirmity seems clear. No better illustration could be given than the reference to *Cole v. Cole,* 27 Wis. 531; *Hoernig v. Hoernig,* 109 Wis. 229, 85 N. W. 346, and other cases to demonstrate that under sec. 2364, Stats., the estate, real and personal, of the wife derived from the husband is to be treated as the property of the husband in exercising the court's jurisdiction to divide and distribute property. There is no doubt about

that; but counsel failed to appreciate that such property is only so treated in the event of a division. In this case the court held there could be no such division, and yet proceeded to exercise the jurisdiction conferred to be exercised solely upon such contingency. Without it, the property of the wife, as we have heretofore said, derived by her through the voluntary act of the husband, is her separate estate, not to be interfered with in any way in a divorce action. There was a suggestion to the contrary in *Donovan v. Donovan,* 20 Wis. 586, under the Revised Statutes of 1858, where it was intimated that in case of a divorce because of the adultery of the wife, the court had power to divest her title to real estate and confer so much as equity might require upon her husband. It was a personal suggestion of the justice who wrote the opinion as to a matter not involved in the case. The decision of the court is in harmony with what we have said here. Certainly no such power exists now except in case of a division of property as provided in the statute.

Defendant Kanneberg did not appeal, but his interest is so involved with that of appellant that it must abide a decision of the court below in the light of the law as we have declared it. The judgment as to property must be wholly reversed and the cause be remanded for the trial court to exercise its discretion as to a division of property between the parties, including the property of appellant derived from respondent, keeping in mind that, for the time being, the title to all the property which the court divested appellant of, belongs to her and that the mortgage thereon is valid except as such title and mortgage shall be disturbed on a division of property under the statutes.

By the Court.—The judgment as to the property of the parties is reversed but as to the divorce it is affirmed, and the cause is remanded for further proceedings in accordance with the opinion, further evidence to be taken if the trial court shall deem that advisable. Costs will be taxed on this appeal in favor of appellant.

JEWEL TEA COMPANY, Appellant, vs. HIMMELSTEIN, Respondent.

October 27—November 14, 1916.

Master and servant: Contract of employment: Termination: Wrongful discharge: Covenant not to engage in same business: Enforcement: Injunction.

1. A contract provided that the services of an employee thereunder might be terminated by the employer at any time without notice if the employee should be found to have been guilty of negligence, inattention to his duties, shortage in his accounts, etc., or might be terminated at any time by either party upon giving to the other two weeks' notice thereof in writing. In an action based on said contract, findings by the trial court that the employer did not resort to either of said methods, but arbitrarily discharged the employee without notice and without cause and in violation of the contract, are *held* to be sustained by the evidence.
2. A further provision in said contract that the employee would not, while in the employment or within one year "after termination of his services with or without cause," engage in the same line of business, directly or indirectly, for himself or for any one else, or interfere in any way with the employer's trade, was not an independent condition of the contract which could be enforced regardless of an unlawful discharge of the employee; and in an action to restrain the employee, after his wrongful discharge, from violating such provision, the court might properly, in its discretion, deny that relief on the ground that the employer had itself breached the contract.
3. The termination of the employee's services "with or without cause," spoken of in the contract, must be construed to mean a termination in one or the other of the two methods specified therein.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing plaintiff's complaint and dissolving a temporary injunction.

The plaintiff is in the business of selling tea, coffee, and other commodities and has its principal place of business in Chicago, Illinois, and a branch office in the city of Oshkosh,

Wisconsin. After several years' employment of the defendant by the plaintiff the two made a written contract on August 2, 1915, for the term of one year. The following provisions, in substance, were contained in the contract in clauses numbered as follows:

(13) That defendant during his employment with the company and after the termination of his services, for any cause, will not divulge to any person not connected with the company any of its business methods, forms, names or addresses of customers, and that he would not at any time while in the employ of the company nor within a period of one year after the termination of his services, *with or without cause,* either: 1st, for himself or any other person, firm, or corporation, directly or indirectly, engage in the business of selling teas, coffees, etc., or other like merchandise handled by the company during his period of employment in any of the cities where delivery routes have been assigned or intrusted to him; 2d, that he would not, directly or indirectly, for himself or any other person or firm solicit or take orders for any such merchandise in any of such cities; 3d, that he would not in any way, directly or indirectly, solicit, take away, or interfere with any of the custom, trade, or patronage of the company in such cities. "It is mutually understood and agreed by the parties hereto that the provisions of this thirteenth paragraph are the very essence of this contract, and that the company employs the manager upon the express condition that he agrees to each of the provisions thereof."

(14) It is further agreed that the services of the defendant under this contract may be terminated by the company at any time without notice in the event that the company shall find the manager has been guilty of negligence, inattention to his duties, shortage in his accounts, etc., otherwise the services of the defendant, under this contract, may be terminated at any time by either party upon giving the other party two weeks' previous notice in writing.

It appeared that defendant did not continue in the employ of plaintiff after September 11, 1915, and then or immediately thereafter commenced to work for another corporation engaged in a similar line of business and in the same district in which defendant had been working for plaintiff. By the original verified complaint it was recited that about August 28, 1915, plaintiff gave the defendant the two weeks' notice to terminate the contract and alleged that in conformance therewith the term of service was terminated September 11th, but also recites that on the same day, August 28th, it was agreed between the parties that defendant, after the termination of his services as manager, would remain in the employ of plaintiff as salesman, and then recites that defendant refused to comply with such agreement and left the service of plaintiff.

By the amended verified complaint the same contract of August 2, 1915, was relied upon and it was alleged that defendant continued in such employment until September 11th, but it omitted any reference to the giving of any notice to terminate the contract, but goes on to say that on August 28th plaintiff and defendant mutually agreed that at the end of the two weeks the accounts should be audited and thereafter, if it was desired, he could remain in the employ of the plaintiff, and recites that upon an audit on September 11th there was a shortage of $40.68, and that thereupon the authorized representative of the plaintiff notified defendant that on account of such shortage his services were thereby terminated under the terms of the contract.

The complaint contains further allegations to the effect that the defendant had valuable information as to the customers and business of the plaintiff, that it had required a long time and great expense to build up such business in Oshkosh and vicinity, and that were defendant to engage in said business for himself or some one else in the same line in that neighborhood it would do great and irreparable injury to the plaintiff.

After trial, findings were made to the effect that there was no modification of the contract of August 2, 1915, on the 28th day of August, 1915, or at any other time as alleged; that on the audit on September 11th $40.68 was found in favor of plaintiff, which was paid on the same day by defendant, and that no complaint was made on the part of plaintiff of any shortage in the account of defendant and the defendant was not discharged from his employment on the ground or on account of any shortage found or claimed in the defendant's account; also the following finding: "4. That on the 11th day of September, 1915, the plaintiff supplanted the defendant with another manager and arbitrarily discharged the defendant from his said employment under said contract without notice and without cause and in violation of the terms of said contract." Upon the findings judgment was entered dismissing the action and vacating the preliminary injunction, from which judgment an appeal was taken.

For the appellant there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *F. A. Teall.*

For the respondent there was a brief by *Stewart & McDonald,* and oral argument by *F. C. Stewart.*

Eschweiler, J. The appellant contends that there was no support for the fourth finding of fact above recited and that the court erred in directing judgment for the defendant. An examination of the evidence in this case satisfies us that it was sufficient to warrant the court in so finding.

Plaintiff sent a Mr. Arnold, its auditor, who made an audit on September 11th. This audit was quite a complicated matter, involving not merely an examination of the cash received by defendant and disbursed by him, but also a checking over of an inventory of many items of merchandise and premiums on hand and other matters, and when it was completed it showed the so-called shortage of $40.68, which was, when ascertained, promptly paid by defendant to the auditor and retained by the plaintiff. The nature of the items in-

volved in such audit and the method of doing the business under the contract was such that the court might well have concluded that there was no element of evil design on defendant's part in connection with such shortage and therefore no such breach of good faith as might in law, irrespective of the contract, amount to sufficient to terminate the relationship.

The defendant was the only witness on the trial testifying as to any conversation between himself and any representative of the plaintiff at which any such notice of termination of the contract as was alleged in the complaint could have been given, and his testimony is that nothing was said about his being discharged on account of the shortage or for any reason. There was therefore no evidence in the record to support the allegations of the complaint that there was a discharge of the defendant on account of such shortage.

It also appears without contradiction that on August 28th the defendant was at the home office in Chicago with one Purner and some discussion was had about the situation in defendant's office, and it appears from the testimony of Mr. Purner that on August 28th arrangement was made between himself and the plaintiff that he was to take the management of the Oshkosh branch as soon as defendant's accounts were audited and that was to be September 10th, and that a written contract to that effect was made between them on August 29th. This was before it was ascertained that there was any shortage. This fact is material only as an aid in determining what was the real situation between plaintiff and defendant on September 11th, but, with the other evidence as to what took place between the parties and the different attitudes the plaintiff had assumed in its several pleadings, makes sufficient basis for the disputed finding.

It is further contended by plaintiff that in any event the condition in the contract, by which defendant covenanted and agreed that he would not at any time while in the employ of the company nor within a period of one year after termination of his services, *with or without cause,* either enter into

business with any other company in the same line of business or in any way interfere with plaintiff's customers or trade, is an independent condition of the contract and can be enforced regardless of the question whether or not defendant was unlawfully discharged by plaintiff, leaving plaintiff to his remedy by action for any unlawful discharge.

The contract between these parties expressly provided for but two ways in which it might be lawfully terminated. One authorized the plaintiff to terminate it without notice upon ascertaining either that there was a shortage in defendant's accounts or for certain other grounds specified. The second method provided was by two weeks' notice in writing by either party of desire to terminate the contract. The first method necessarily requires some affirmative action by plaintiff in order to set it in operation; the mere occasion for it, *i. e.* a shortage, would not automatically discharge the employee; it merely dispensed with any delay being between the occasion and the discharge therefor when such was determined upon.

In the findings in this case it appears that the plaintiff did not resort to either of these two methods to terminate the contract, but did by its action remove or supplant defendant from its employ and thereby itself breached the contract. The termination of his services, *with or without cause,* referred to in the thirteenth paragraph of the contract, must be construed to be a termination by one or the other of these two methods. Having thus disregarded the contract itself, the court below, in the exercise of that discretion which is always involved in questions concerning the granting or refusing to grant restraining orders, might properly have felt that equity would refuse its aid under the circumstances when asked to compel the other party to such repudiated contract to live up to provisions such as are sought to be enforced in this case.

By the Court.—The judgment of the circuit court is affirmed.

HARTWIG, Appellant, vs. ELIASON, Respondent.

October 27—November 14, 1916.

Costs: Allowance: "Recovery:" Statutes construed: Libel and slander: Counterclaim: Offsetting damages.

1. **The word "recovery" as used in sec. 2918, Stats.,—providing that costs shall be allowed to the plaintiff upon a recovery in specified actions,—refers to the judgment in the action, not to the verdict.**
2. **Under secs. 2859, 2861, Stats., where a counterclaim is interposed in an action for money damages, there are never two recoveries, but only one, namely, the difference between the sums allowed by the jury or the court to the respective parties.**
3. **Thus, in an action for slander, where defendant counterclaimed for libel and the jury found both the slander and the libel and assessed the damages of each party at six cents, the court properly offset the damages and rendered judgment for defendant for full costs, under sec. 2920, Stats., there being in such case no recovery by plaintiff within the meaning of sec. 2918.**

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *James F. Trottman,* of counsel, and *Gustav Buchheit,* attorney, and oral argument by *Mr. Trottman.*

For the respondent the cause was submitted on the brief of *Wilbur E. Hurlbut.*

WINSLOW, C. J. Plaintiff sued defendant for slander, and defendant, in addition to certain affirmative defenses, counterclaimed for libel. The action was tried and the jury by special verdict found both the slander and the libel and assessed the damages of each party at six cents. The court offset the damages, rendered judgment for the defendant for full costs, and the plaintiff appeals.

The only question raised is as to the right of the defendant to recover costs. This is purely a question of statutory

construction and we think the statutes were correctly construed by the trial court. The fundamental statutory provisions are sec. 2918 and 2920, Stats. Sec. 2918 provides that costs shall be allowed to the plaintiff upon a "recovery" . . . "in an action of . . . libel, slander, . . ." but if he recover less than $50 damages he shall recover no more costs than damages. Sec. 2920 declares that the defendant shall be allowed costs in such actions unless the plaintiff be entitled thereto.

It follows from these provisions that if the plaintiff here "recovered" six cents damages he is entitled to six cents costs and the present judgment is wrong, but if the plaintiff recovered nothing the defendant is entitled to full costs and the judgment is right. It all depends on the meaning of the word "recovery" in sec. 2918. However the word may be construed in other connections, it appears certain from the provisions of secs. 2859 and 2861, Stats., that it means judgment in the cost statute and not verdict. These sections make it clear that in actions for money damages, where a counterclaim is interposed, there are never two recoveries but only one, namely, the difference between the sums allowed by the jury or the court to the respective parties. Here the amounts allowed by the jury were equal, and the court properly offset them and rendered judgment for costs to the defendant because there was no recovery by the plaintiff.

The cost bill was large in the present case and the result seems not entirely just in view of the fact that the battle was practically drawn, but this is a matter for the consideration of the legislature, not the court.

By the Court.—Judgment affirmed.

SCHEUER, Respondent, vs. MANITOWOC & NORTHERN TRACTION COMPANY, Appellant.

October 27—November 14, 1916.

Street and interurban railways: Negligence: Collision: Horses beyond control: Duty of motorman: Appeal: Review: Questions of fact: Evidence: Competency: Harmless errors: Instructions to jury.

1. If the motorman of an electric car observes, or in the exercise of ordinary care should observe, a person with his team in the zone of danger from such car, or liable to enter such zone, and that the horses are not under control, it is the duty of such motorman to exercise ordinary care to prevent a collision.
2. The verdict of a jury cannot be disturbed on appeal if there is any credible evidence to support it.
3. Findings by the jury in this case that plaintiff's horses were beyond his control from the time they left a concrete way, which was parallel with defendant's interurban railway within the limits of the highway, until they were struck by a car, and that the motorman knew that fact in time to have prevented the collision by slowing or stopping the car, are *held* to have support in the credible evidence.
4. There being other uncontradicted evidence that the value of plaintiff's horse, which was killed, was as found by the jury, there was no prejudicial error in permitting plaintiff to testify, in respect to its value at the time it was killed, that he had been offered $225 for it.
5. It was not error to refuse to permit defendant to show, on cross-examination of plaintiff, that he asked, a half hour or so after the accident, if the motorman could not have stopped the car quicker; nor to refuse to permit him to state whether he did not make up his mind at the time of the accident that his injuries were the result of the motorman's negligence.
6. The fact that the doctor who attended plaintiff had stated that while the injury to plaintiff's eye might become permanent, he could not say it would be so, did not preclude him from giving his opinion that the injury would become chronic.
7. The error, if any, in submitting to the jury the question whether, at the time the motorman set the brakes, the car was being run at a negligent rate of speed under the existing circumstances, was not prejudicial, it appearing that the result of the trial

would have been the same if the question had been omitted from the special verdict.

8. It is not error to refuse to give requested, proper instructions if the same, in letter or substance, are given in the general charge.

9. In an action for injuries to person and property caused by an electric car colliding with plaintiff's team, instructions to the jury as to the question whether the horses were beyond plaintiff's control for some time prior to the accident, as to the motorman's knowledge of that fact and his negligence in failing to slow up or stop the car, and as to whether the car was going at an excessive rate of speed, are *held* to have been warranted by the evidence and not to have invaded the province of the jury.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover for injuries to person and property, claimed to have been caused by defendant's negligence.

The defendant operated an interurban railway between Manitowoc and Two Rivers, Wisconsin. The track was located in the highway, alongside of and a few feet away from a concrete traveled track. Plaintiff claimed that, as he was driving his team of horses, hitched to a lumber wagon, along such concrete way, the horses became unmanageable, the one furthest from the track crowded the other toward such track and into the pathway of a car which was approaching at great speed from behind; that the motorman saw, when he was a considerable distance away, that if he did not slow up or stop his car, it was liable to collide with the team; that he not only did not make any effort to guard against the danger, but sounded the car whistle, sharply, which increased the unmanageableness of the team so plaintiff could not keep the same clear from the track, and in consequence, the car struck the horse which was on the track and the wagon, killing the horse, injuring the wagon, and throwing plaintiff therefrom and greatly injuring him.

The issues as made by the pleadings, and in respect to which there was evidence in the judgment of the trial court

to carry them to the jury, are fairly indicated by the following special findings which are stated in an abridged form:

1. From the time the horses, or one of them, was off the concrete on the highway until the accident, the horses were beyond plaintiff's control.

2. The motorman knew such condition in time for him to have prevented the collision.

4. The motorman was negligent in not avoiding the collision.

5. Such negligence was a proximate cause of the injuries complained of.

6. When the motorman applied the brakes, the car was moving at a negligent rate of speed, under the circumstances.

7. Such negligence was a proximate cause of the injuries complained of.

8. Plaintiff was not guilty of contributory negligence.

9. It will require $335 to compensate plaintiff for the injuries to his horses, $11 for damages to his harness and wagon, and $763.50 for injuries to his person.

In reaching the conclusions indicated, the jury had for consideration evidence to this effect: Plaintiff, as he was driving his team along the concrete way near the railway track, saw defendant's car coming when it was some 400 feet away and to his left. The near horse was not disturbed by the presence of the car but the off one became very restive and commenced trying to plunge forward. The effect thereof was to crowd the near horse toward the track. Soon both horses left the concrete way, veering near to the track and the indications were, and fact was, that plaintiff could not prevent it. The motorman observed that condition when he was some 200 feet from the wagon. He thought there was some danger. The team continued on a slanting course down into the ditch between the margin of the concrete way and the track, then along such ditch and, finally, the near horse was crowded

onto the track, plaintiff endeavoring all the time to control the team and signaling, at one time, with upraised hand, to the motorman of his plight. He raised his hand when the horses were in the ditch and some 150 feet from the coming car. They traveled in the ditch, close beside the track, for from 75 to 100 feet before the near horse was crowded onto the track. The danger zone was so invaded some seventy feet in advance of the car. It could easily have been stopped after the motorman saw the team was veering toward the track and was liable to enter its pathway, before the point where the collision took place. He did not do so. When not far from such point he sounded the car whistle which increased the unmanageableness of the horses, particularly the off one. The car struck the wagon, or near horse, or both. Thereby, or by the springing of the horses at the instant the car struck, the front wheels were jerked clear from the hind wheels and the wagon box. The horses with the front wheels went some seventy feet after the collision. The car came to a stop so that the horses were near the rear step. The near horse was on the ground and fatally injured, its back being broken. Plaintiff fell between his wagon and the car. He was severely injured, particularly in his right eye.

Counsel for defendant moved the court to change the findings so as to entitle it to judgment, and for judgment notwithstanding the verdict, and made other motions and saved exceptions requisite to raise the questions for consideration on appeal; referred to in the opinion. Such motions were denied and, on motion of counsel for plaintiff, judgment was rendered in his favor for the amount assessed in his favor by the jury.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *J. F. Martin.*

MARSHALL, J. The main grounds of complaint presented for consideration are that the evidence does not support the finding that respondent's horses were beyond his control during the time which elapsed between the instant of their swerving from the concrete way toward the railway track and the instant of the collision, or the finding that the motorman knew such condition in time to have enabled him to have prevented the collision by slowing up or stopping the car. It is not claimed, and could not reasonably be, that the motorman was not actionably negligent, if the facts were as found by the jury. Certainly, if a person in charge of an electric car observes, or by the exercise of ordinary care should observe, another with his team in the zone of danger from such car, or liable to enter such zone, and that the horses are not under his control, it is the duty of such person to exercise ordinary care to prevent colliding with them. That is so clear, as a principle, that no illustrations of its application are necessary. If it were otherwise, *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536, would be sufficient.

Seldom has such an earnest and confident appeal been made to this court to examine the evidence in a case in respect to a contention that it is insufficient to support the findings of the jury, as counsel for appellant made at the bar and in their written brief. They do not seem to go so far as to claim there is no evidence to support the vital findings referred to; but insist that such findings are against the great preponderance, or overwhelming preponderance, of the evidence.

As counsel earnestly requested, we have made a careful study of the evidence in all its bearings, without being able to conclude that there is no credible evidence to support the findings. To embody the evidence here and point out in detail those portions which support the findings, would require a very long opinion which would not be of any particular

value as a guide in future cases or illustrate any principle which has not been illustrated so often as to become as familiar as it can well be.

The verdict of a jury cannot be disturbed on appeal to this court if there is any credible evidence to support it. It may appear by the printed record to be against the preponderance of the evidence, and yet if there was some believable evidence, in any reasonable view of it, giving due weight to the superior advantages possessed by the trial court and jury for discovering the truth, and the fact that such court deliberately passed upon the matter in submitting the case to the jury and again in refusing to set aside the verdict as contrary to the evidence, and that such determination, in the light of the presumption in its favor, must be taken as correct unless it appears to be clearly wrong, the decision cannot be disturbed here. The law is so well settled in that regard that the rule stated is practically one of jurisdiction. It is solely the province of the trial court to set aside a verdict and grant a new trial upon the ground that it is against the preponderance, or even the great preponderance, of the evidence, if there is yet some credible evidence upon which it can rest.

After devoting all the labor to a study of the evidence which could efficiently aid in coming to a right conclusion, we are quite far from being able to decide that the vital findings which counsel attack are wholly unsupported. As indicated in the statement, there is evidence tending to support such findings and that is sufficient. That there are conflicting views which could be taken of the matter, is evidenced by the fact that counsel for respondent, as confidently, contend that the great preponderance of the evidence is in favor of the findings as counsel for appellant contend to the contrary. It seems that, notwithstanding frequent references here to the weight that must be given to a jury finding, affirmed by the trial court, that is sometimes not fully appreciated, and so it happens that cases are presented where this court is urged to consider the evidence as a jury is required to consider the

same, and to exercise the discretion exclusively given to the trial court to grant a new trial upon the ground that the preponderance, or great preponderance, of the evidence is contrary to the jury determination. Of course, we must and do appreciate that the evidence is liable to appear quite different to the losing than to the prevailing party and that explains how it happens that counsel for appellant, as here, confidently contend that the verdict is without support in the evidence, or is against the great preponderance thereof, while counsel for respondent, just as confidently, contend that the preponderance of the evidence is in support of the verdict, or preponderates so significantly that way that no other verdict could reasonably have been rendered. That illustrates the importance of maintaining, in all its integrity, the rule before stated.

Nothing further need be said on the subject of whether the first two findings have efficient support in the evidence. It might be more satisfactory to counsel for appellant if we were to take time and space to quote the evidence thought to support such findings, but if opinions in such cases as this were customarily written that way, the books would be filled up with useless matter as regards principles and making valuable precedents. The course adopted here is not taken to lessen judicial labor. If it were best, the writer would gladly write at considerable, or even great, length to demonstrate that there is support in the evidence for the jury findings, by referring to such evidence in detail, but the idea to the contrary seems best. All has been done in this instance to promote justice between the parties which can be consistent with the established unwritten law. It has all the force of written law. Thereby the findings of the jury, on the question of whether they have efficient support in the evidence, must be regarded as verities.

It is suggested that errors were committed in receiving and rejecting evidence in the following particulars:

1st. In permitting respondent to testify in respect to the

value of the horse which was killed, that he had been offered $225 therefor.

2d. In refusing to permit appellant to show on cross-examination of respondent that he asked, a half hour or so after the accident, if the motorman could not have stopped the car quicker.

3d. In refusing to permit respondent to state whether he did not make up his mind at the time of the accident that his injuries were the result of negligence of the motorman.

4th. In permitting the doctor who attended respondent to testify that he found in the latter's eye a chronic condition.

There was, in any event, no prejudicial error on the first point as there was considerable uncontradicted evidence that the value of the horse, at the time it was killed, was as found by the jury.

In respect to the second point, it does not seem material whether respondent asked the question or not.

In respect to the third point, at what time respondent made up his mind his injuries were the result of the motorman's negligence was clearly unimportant. It could not have any legitimate bearing on the vital questions in the case.

In respect to the fourth point, the evidence was proper. The fact that the doctor had stated that while the injury to the eye might become permanent, he would not say it would be so, did not preclude him from giving his opinion that the injury would become chronic.

Further error is assigned on the court's submitting to the jury the question of whether, at the time the motorman set the brakes, the car was being run at a negligent rate of speed, under the existing circumstances.

It does not seem that any fault can well be found because of the submission of that question. The result of the trial would have been the same if it had been omitted. Strike the question and answer out of the verdict and what remains will make a perfect basis for the judgment which was rendered.

It is further suggested that errors were committed in respect to instructions given to the jury in these particulars:

1st. In refusing to instruct the jury as requested.

2d. In stating to the jury, in respect to whether the horses were not under control of respondent for some time immediately prior to the accident, that before they should so find they "should be satisfied from the evidence that by rearing, jumping, crowding, or some other like acts or conduct, or by the course which the horses took in going from the concrete bed of the highway to the railway track, or by such acts in more than one of those respects, and by the greater weight of the evidence on the subject . . . that plaintiff was not able, by proper and reasonable efforts, to control the horses, nor to guide or stop them, nor to keep them off from the defendant's car track, and that he made such effort and used ordinary care and skill in that respect."

3d. In instructing the jury to the effect, in respect to the question of whether the motorman knew the horses were beyond control of respondent in time to have prevented the collision by slowing up or stopping the car, that they should take into consideration the evidence tending to show that the horses were off the concrete way for a considerable distance and went in a slanting direction therefrom to the railway track and were a considerable time in going that distance.

4th. In stating to the jury that, in case they failed to find the motorman knew that the horses were beyond control of the driver in time to have enabled him to prevent the collision by slowing or stopping the car, in determining whether the exercise of ordinary care by the motorman would have disclosed to him that the horses were beyond control of the driver in time to have enabled him to prevent the collision by slowing or stopping the car, in substance that they should consider what was said in regard to the second question and whatever appeared from the evidence as to the distance the horses traveled from the time they left the concrete way until they got

on the railway track, and whether they went directly on to the track or took a slanting course.

5th. In instructing the jury in respect to whether it was negligence on the part of the motorman not to have slowed or stopped the car in time to have prevented the collision, in effect, that it was not the duty of the motorman to slow or stop the car unless it was, or would have been, reasonably apparent to him, by the exercise of ordinary care, that the horses were liable to get beyond the driver's control and that there might probably be a collision of the team with the car unless it was prevented or avoided by the motorman's act.

6th. In instructing the jury in respect to the sixth question, covering the subject of whether the car was going at an excessive rate of speed, under the circumstances, when the brakes were applied by the motorman, in effect, that a rate of speed of twelve miles an hour under ordinary circumstances would not be excessive but under the circumstances of the case, taking into consideration what the motorman knew, or ought to have known, it was for the jury to say whether the car was going at a negligent rate of speed or not when the brakes were applied.

We have thus grouped the complaints as to instructions for the purpose of brevity and convenience and will deal with each as the merit thereof seems to require.

It is a sufficient answer to the first suggestion that counsel, in their brief, practically concede that most of the requested instructions were embodied in those which the court gave, and our attention is not directed to anything which was prejudicially omitted. It is not error to refuse to give requested, proper instructions if the same, in letter or substance, are given in the general charges. *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 473, 120 N. W. 264; *Herlitzke v. La Crosse I. T. Co.* 145 Wis. 185, 190, 130 N. W. 59.

It is said that, by the language used by the court under the second head above mentioned, the jury were, in effect, told

that the course the horses took in going from the concrete way to the track was evidence that they had gotten beyond the driver's control and they might so find upon such circumstance if unable to determine the fact by reason of the horses rearing, running, jumping, crowding, or some other like acts. That is hardly a fair construction of the charge. The jury were told that they must determine by evidence on one or more of the circumstances, but left it entirely to them as to the weight they should give to any such circumstances and whether any such circumstance was satisfactorily shown to exist.

The third of counsel's suggestions is so involved with the second that nothing special need be said in respect to it. We cannot agree with counsel that there was no evidence that the horses went in a slanting course from the concrete way to the track. There was evidence tending to prove that the horses were off the traveled track for a considerable time before the railway track was invaded, the off horse all the time crowding the near one toward such track.

The complaint under the fourth head is that the court placed too much weight upon the inferences to be drawn from the course which the team took in going from the concrete road to the highway. The court did not draw any such inference, as we read the instructions; but left the matter wholly to the jury to draw such inferences as they thought proper from whatever, in their judgment, the facts were as established by the evidence. There was considerable evidence bearing on all the matters referred to in the instruction.

The instruction mentioned under the fifth head was a correct statement of law. If it was reasonably apparent to the motorman, or would have been by the exercise of ordinary care, that the horses were beyond the driver's control, and hence that there was a probability of the car striking them unless it was slowed up, or stopped, very clearly it was his

duty to exercise all reasonable care to do so. The instruction was fully warranted, as we have heretofore said, by *Gould v. Merrill R. & L. Co.* 139 Wis. 433, 121 N. W. 161.

We perceive no good reason why the instruction mentioned under the sixth head was erroneous. There was much evidence bearing on the subject and the matter seems to have been fairly submitted.

We have now dealt with all the suggestions made by counsel for appellant without discovering any reason why the judgment complained of should be disturbed, and it must therefore be affirmed.

By the Court.—Judgment affirmed.

VANNATTA, Appellant, vs. LANCASTER LIGHT & POWER COMPANY, Respondent.

October 27—November 14, 1916.

Trial: Questions for jury: Changing findings: Negligence: Death: Contributory negligence: Electric wires: Height: Crossing over highway bridge: Statute construed.

1. The submission of the issues for special verdict is in this case *held* entitled to little weight as a decision by the trial court that conflicting inferences might be drawn from the evidence, that court having thereafter changed or set aside the jury's findings that defendant was negligent and plaintiff free from contributory negligence and having clearly stated in a written opinion that such findings were unwarranted because the undisputed facts established the contrary as a matter of law.
2. The side trusses of an iron highway bridge rose to the height of sixteen feet above the floor and were fastened together at the top by cross-beams and braces, so that nothing over sixteen feet high could pass over the bridge. High tension electric wires of the defendant light and power company crossed diagonally above said bridge near one end, one of such wires being attached to a pole on each side of the bridge at a height of twenty-nine feet three inches above the ground, and being at the point in

question six feet two inches above the top of the bridge and thirty-two feet above the ground beneath the bridge. Plaintiff's son, eighteen years old and nearly six feet tall, climbed to the top of one of the trusses and in some way came in contact with, or within two inches of, said wire and was killed. Upon evidence showing the above, among other facts, it is *held*, as matter of law, that defendant was not negligent in so constructing its lines, and that the deceased was guilty of contributory negligence.

3. Sub. 2, sec. 1329*a*, Stats. 1915,—providing that all such wires shall not be less than twenty-four feet above the ground at all crossings and not less than fourteen feet above the ground at all other places,—did not apply to the defendant in the construction of its line over the bridge in question.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action to recover damages for the death of plaintiff's son caused by his coming into contact with a high tension electric wire of the defendant company.

The circuit judge fully states the facts of the case in his written decision upon defendant's motion to change the answers of the jury to the second, third, fourth, and fifth questions, as follows:

"The plaintiff was the mother of Iris Clifford Vannatta, who was killed on August 13, 1915, while on the iron highway bridge that crosses Little Platte river about half a mile north of the city of Platteville, by a discharge of electricity from a transmitting wire of the defendant that diagonally crossed above said bridge near its northern end. . . . At the close of the plaintiff's testimony the defendant's attorneys moved the court to direct a nonsuit. This motion was overruled. At the close of the testimony a motion was made by the defendant's attorneys to direct a verdict for the defendant. This was likewise overruled and questions for a special verdict were submitted to the jury, . . .

"The special verdict was in substance as follows: (1) That Iris Clifford Vannatta came to his death while he was on the top of a sixteen-feet high truss of said bridge through a charge of electricity from a live wire of the defendant com-

pany that diagonally crossed said bridge about twenty-two feet above the floor of the bridge and over six feet above the top of said truss; (2) that defendant was negligent in so constructing its wires over this bridge; (3) that the manager of the defendant company, as a man of ordinary care and experience in the erection of poles and wires for carrying electricity, ought reasonably to have foreseen, under the attending circumstances, that as a natural and probable consequence of so carrying said wires over this bridge injury might occur to a person on the bridge who was using ordinary care for his own safety; (4) that no want of ordinary care on the part of the deceased contributed to produce his death; (5) that the plaintiff was entitled to receive $4,000 for the death of her son. . . .

"This case was remarkable in this: that there was no material conflict in the evidence. The undisputed facts of the case are as follows: The plaintiff at the time of Clifford Vannatta's death was sixty-eight years old. Clifford at that time was eighteen years of age and nearly six feet tall. He was her youngest child and lived with her. She received his earnings and supported him. He had no special employment, but worked at various jobs. He received for his work $2 a day. The plaintiff had seven other children—all of them married. At the time of this unfortunate accident she was visiting with one of them in Dakota.

"The bridge in question on the Platteville and Lancaster highway is constructed wholly of iron, excepting the floor of the bridge, which is of wood. It is ninety feet long and fourteen feet wide. The iron trusses at the sides rise to the height of sixteen feet from the floor of the bridge. In each truss there are iron uprights rising from the bottom of the bridge sixteen feet to the flat top of the truss. These uprights are made of iron beams sixteen feet long, connected together with lattice-work irons, the uprights being eight inches in diameter. The two trusses are fastened together at the top with cross-beams and truss rods; also by cross-braces or rods three quarters of an inch in diameter which go diagonally from the top of one truss to the top of the other. The highway is made to slant up to each end of the bridge.

"The defendant company receives its electricity for lighting and power from a generating plant at Galena, conducted through the city of Platteville, which also receives its elec-

tricity from the same source. The defendant was authorized to use the public highway from Platteville to Lancaster by the towns through which the highway runs for the purpose of setting poles for the attachment of its wires for transmitting electricity. The work of constructing this line was finished late in 1914 and the current then began to pass over it. The poles used were of Idaho cedar, thirty-five feet long and were set 175 feet apart. Three lines were strung on them, which were known as the top bow wire, the arrow wire, and the bottom bow wire. The three, in the order named, were strung above ground at the height of thirty-one feet six inches, twenty-nine feet three inches, and twenty-seven feet three inches. These wires crossed diagonally above the north end of said bridge. The arrow wire was nearly directly above the north upright of the east truss and six feet two inches above the truss. There was no water in the bed of the stream below this upright—only dry ground. The distance at this point from the arrow wire to the floor of the bridge was twenty-two feet two inches, and to the ground below the bridge was thirty-two feet.

"The deceased was killed by an electric discharge from the arrow wire when he was at the top of the east truss at the place of the said north upright. He with Lloyd Hubler, aged twenty-two years, and Blanch Bell and Violet Coldwell, two young ladies about seventeen years of age, started from Platteville in a single-seated automobile to take a ride on the Lancaster road. When they got upon this bridge Clifford asked them to stop and look at the fish. They stopped the car upon the bridge and he got out, the others remaining in the auto. He started to climb up said upright by the zigzag cross-irons. The other three asked him to desist as he might fall into the water. He replied that there was no danger, for when a boy he had climbed the bridge many times. When he got to the top of the truss he leaned over it with his face toward the river. He then called to them 'Here comes a fish,' or 'Look, here comes a fish.' They all looked to the river to see the fish, and presently 'there was a flash and fire jumped from all parts of the bridge' and there was a roar. They all looked up and saw Clifford falling feet foremost to the floor of the bridge. Hubler rushed to him and found that he was dead.

"The foregoing is the substance of the testimony of the

three eye-witnesses to the tragedy as to how it occurred. None of them spoke of receiving any electric shock. Edward Bennett, professor of electric engineering at the University and a person of wide experience in electrical affairs, was a witness for the defendant, and had been to this bridge and had observed it and the three wires that cross it. He had climbed the same upright that the deceased did and had assumed the same position at the same place that the deceased occupied when he was last seen alive, and suffered no injury or shock from any of the wires. It was in proof that the current transmitted over these wires was 33,000 volts. Mr. Bennett testified that a current of that potency would not leave the conducting wire for any object, not even a copper point, unless such object came as near to the wire as two inches. This assertion stands in the testimony unquestioned. It was also in evidence and undisputed that this iron bridge, grounded as it is at both ends, is an excellent conductor, and that with the many iron bars and rods crossing it at the top, if the conducting wire over the bridge should break and the ends fall upon the bridge the electricity would be carried by the iron work to the ground and no injury happen to a traveler on the bridge."

The circuit court denied plaintiff's motion for judgment upon the verdict and ordered that the answers of the jury to the second, third, fourth, and fifth questions of the special verdict be set aside because they are wholly unsupported by the evidence. Judgment was entered in favor of the defendant dismissing plaintiff's complaint and that the defendant have and recover costs and disbursements of the action. From such judgment this appeal is taken.

For the appellant there were briefs by *J. W. Murphy* and *Kopp & Brunckhorst,* and oral argument by *Mr. Murphy.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Howard T. Foulkes,* of counsel, and oral argument by *Mr. Foulkes.*

SIEBECKER, J. It is argued that the action of the court in submitting the issues to the jury for determination by special verdict was a ruling to the effect that the evidence permitted

of conflicting inferences and required determination thereof by a jury. The record, however, shows that the trial court expressed the opinion, in ruling on defendant's motion to change the jury's answers of the special verdict and for judgment in its favor, that the evidentiary facts in the case are without dispute and establish as a matter of law that the defendant's officers and agents were not negligent in the construction and operation of the electric lighting plant and that the decedent was guilty of contributory negligence. In the light of this holding of the court the views expressed by this court in the case of *Gillett v. Flanner-Steger L. & L. Co.* 159 Wis. 578, 150 N. W. 987, as to the weight to be given to the decision of the trial court upon issues of fact in trials to a jury, are against plaintiff's contention. The trial court clearly held that there was no room in the evidence to permit the jury to find that the defendant was negligent or that the decedent was free from contributory negligence.

The trial court's decision on the questions of defendant's negligence and decedent's contributory negligence is helpful and persuasive on these points. In his consideration of the evidence on the jury's finding that defendant was negligent he declares:

"This, as applied to the facts in this case, was a finding that the person charged with the work of constructing this electrical lighting line ought, as a reasonable person, to have foreseen that a young man in a daring mood might climb to the top of a sixteen-foot truss and then in some way to come in contact with the electric wire that was six feet two inches above the truss. Bridges are built by the towns and cities to travel on, not as places upon which to perform venturesome feats. The question that should properly have been in the mind of the constructor of the electrical line was: Will any one of the traveling public be at all likely to suffer injury from the electric line as I am constructing it. Evidently with that thought in his mind the work was so done that no traveler upon the bridge could be injured because of the way the wires were strung.

"By their answer to the fourth question the jury found

that no want of ordinary care upon the part of the deceased contributed to produce his death. This finding under the undisputed facts in this case is an astonishing one—that is a better way to speak of it than to say that it is absurd. His companions who remained in the auto protested against this climbing up to the top of the truss, for fear that he might fall into the water, but he proceeded. He evidently enjoyed showing his fearlessness and in startling the girls. When he was leaning over the top of the truss looking at the water and called out to them 'Here comes a fish' when there was no fish, he had an object in doing so. Was it to divert their attention so that he might change his position and when they looked up again still more startle them by being seen standing on the top of the truss? This is not an unreasonable supposition, for it is certain some part of his body either touched the arrow wire or came within two inches of it."

The court held that the provision of sub. 2, sec. 1329*a*, Stats., did not apply to defendant in the construction of its wires over the bridge. The statute reads: ". . . and all wires strung upon such poles shall be not less than twenty-four feet above the ground at all crossings and not less than fourteen feet above the ground at all other places." The court held:

"They claim that the defendant violated the law because the arrow wire was only twenty-two feet two inches above the floor of the bridge and not twenty-four feet as they asserted the law required it should be at this place. Why was a height of fourteen feet above the ground deemed sufficient for electric wires except at highway crossings? Obviously because it might be that something of considerable height might be conveyed along a highway, and for the prevention of injury from contact with the wires it was thought wise to increase the height of the wires at the crossings of a highway by ten feet. But the reason for a height of twenty-four feet does not apply to a bridge so constructed by the tying together of its side trusses at their tops that nothing can be conveyed over it that will reach up over sixteen feet. It is also to be considered that the arrow wire was attached to the poles on each side of the bridge at a height of twenty-nine feet three inches from the ground, and it is a fact that this wire

at the place where the electrical discharge took place was thirty-two feet above the ground beneath it."

It is considered that the trial court properly held that the provisions of this statute do not apply to the defendant in the construction of its line over the bridge under the facts and circumstances shown. We are of the opinion that the judgment of the trial court dismissing plaintiff's complaint is correct.

By the Court.—The judgment appealed from is affirmed.

TOWN OF MINERAL POINT, Respondent, vs. KEALY, Appellant.

October 27—November 14, 1916.

Highways: Encroachments: Fences: Order for removal: Statutory requirements: Service: "Occupant" of land: Other notices: Presumption.

1. A finding by the trial court that defendant was the sole occupant of the land to which fences which encroached upon a highway were appurtenant, is *held* to be sustained by evidence showing, among other things, that although his sister owned a half interest in the property and lived on the premises with him, he was in possession, managing and operating the farm and having control thereof; and service upon the sister of the order requiring removal of such fences, under sec. 1330, Stats., was not necessary.
2. An order under sec. 1330, Stats., for the removal of encroaching fences, which accurately described the center line of the highway and its width, the land to which the fences, which were crooked and irregular, were appurtenant, and that portion of the highway upon which they encroached, sufficiently specified the extent of the encroachment.
3. An order made on September 9th requiring the removal of encroaching fences "within thirty days from the first of October" following, was not contrary to sec. 1337, Stats., which provides that "no person shall be required to remove any fence . . . except between the first day of October and the first day of April."

4. Sec. 1284, Stats., is not applicable, nor is the notice therein provided for a condition precedent, to proceedings under secs. 1330–1337 for the removal of fences which encroach upon a highway. In case of an ancient highway, if any fences existed at the time it was laid out it must be presumed that the proper notice was given under sec. 1284.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This is an appeal from a judgment adjudging that the defendant's fences encroached upon a highway and ordering their removal with costs. On September 9, 1914, the town board of plaintiff served upon the defendant a notice of removal of fences under sec. 1330, Stats. The defendant denied encroachment. Judgment was rendered to the effect that the defendant's fences encroached upon the highway in question and requiring the removal thereof within thirty days from October 1st, with costs. The court made findings of fact and conclusions of law and also delivered an opinion which is part of the record. The only material issue in the case is whether the proceedings of the town board were in compliance with law.

The cause was submitted for the appellant on the brief of *T. M. Priestley* and *Aldro Jenks,* and for the respondent on that of *Fiedler & Fiedler.*

KERWIN, J. The points relied upon by appellant for reversal will be considered in their order.

1. Sarah Kealy, sister of defendant, lived on the premises in question with the defendant, and it is insisted that she was an "occupant" within the meaning of the statute and that notice should have been served upon her. Sec. 1330, Stats., provides that in case of an encroachment by fences in a highway the order of the supervisors shall require the "occupant of the land" to remove the fences and that they shall cause a copy of the order made requiring such removal to be served upon the occupant. It appears in the case that Sarah Kealy

owned a half interest in the property, but that defendant was in possession, managing and operating the farm and having control thereof. The learned trial judge found and held that the defendant was the sole occupant of the land, that he controlled and managed the farm throughout, and was considered by himself and apparently by all who knew the circumstances to be the sole occupant. We are satisfied that the testimony supported the finding of the trial judge upon this point.

2. It is further claimed that the order to remove fences does not specify the extent of the encroachment and is void. The order gives an accurate description of the center line of the highway. The order further provides that the line of said survey is the center of the highway and that said road was laid out three rods wide. Maps appear in the record showing that the defendant maintained crooked and irregular fences in both sides of the highway the whole distance thereof. The order requiring the removal described accurately the land through which the highway passes and that portion of the land in the highway encroached upon by defendant's fences. The court below found that the notice was served under and in compliance with sec. 1330, Stats., and we think the finding has support in the evidence.

3. It is further argued that the notice or order was void because it required the removal of the fences between the first day of April and the first day of October and some Wisconsin cases are cited by appellant upon this point, but it is clear they have no application to the instant case. The order did not require the removal between April first and October first. The order provided: "It is therefore ordered by said town of *Mineral Point* that the said *Michael J. Kealy* be and he is hereby required to remove said fences beyond the limits of said highway within thirty days from the *first day of October, 1914.*" This order was proper and in compliance with sec. 1337, Stats.

4. It is also argued that the town board had no jurisdiction to maintain the proceedings without first having ordered

the fences removed under sec. 1284, Stats. This position is clearly untenable. Sec. 1284 provides for the giving of notice to an occupant of inclosed, cultivated, or improved land to remove his fences and applies to proceedings had upon opening of the highway after it is laid out, not to proceedings to remove encroachments.

Moreover, if any fences existed at the time the highway in question was laid out it must be presumed that the proper notice was given under sec. 1284, Stats. The highway in question is an ancient highway and it cannot be urged in this proceeding that sec. 1284 was not complied with. *Olwell v. Travis,* 140 Wis. 547, 123 N. W. 111. Upon the whole record we are convinced that the case was fairly tried and no prejudicial error committed and that the judgment below is right and should be affirmed.

By the Court.—Judgment is affirmed.

HUOTTE, Plaintiff in error, vs. THE STATE, Defendant in error.

October 28—November 14, 1916.

Criminal law: Receiving stolen goods: Information: Sufficiency: Variance: Verdict finding concealment only: Value.

1. An information charging a statutory offense need not use the precise language of the statute, if its substance is charged. Thus, an information charging that defendant did "feloniously receive, have, and aid in the concealment of" goods, knowing them to have been stolen, was sufficient under sec. 4417, Stats. 1915.
2. Sec. 4417, Stats. 1915, includes two substantive offenses, that of knowingly receiving stolen goods and that of concealing goods known, at the time of concealment, to have been stolen. Such offenses, when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense; and a verdict finding defendant guilty of one of such offenses is a valid verdict.

3. It having been stipulated at the trial that the value of the goods in question exceeded $20, the proof having shown that fact, and no request to charge on the subject of value having been made by defendant's counsel, an objection that there was no finding that the value of the goods concealed exceeded $20 has no force.
4. Where the information charged that on December 14th defendant received and aided in the concealment of stolen goods, and the proof showed that they were received on the 14th but the concealment with knowledge that they were stolen did not take place until the last of the month, there was no fatal variance, it being sufficient that the date proved corresponds substantially with the charge.

ERROR to review a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Plaintiff in error was convicted of violating sec. 4417, Stats. 1915, by concealing goods of the value of over $20 knowing them to have been stolen, and was sentenced to serve a term of nine months in the state prison. To test the legality of such conviction he sued out a writ of error.

For the plaintiff in error there was a brief by *V. T. Pierrelee,* attorney, and *C. A. Lamoreux,* of counsel, and oral argument by *Mr. Lamoreux.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

VINJE, J. 1. The claim that there is a fatal variance between the statute, sec. 4417, Stats. 1915, declaring that "Any person who shall buy, receive, conceal or aid in the concealment of stolen money," etc., shall be guilty, and the information which charges that the defendant did "feloniously receive, have, and aid in the concealment of" the property in question, is not well founded. The precise language of the statute need not be used in the information. It is sufficient that its substance is charged.

2. The court instructed the jury:

"The issues raised, therefore, in this case for you to de-

cide are whether or not the defendant, at the time he received the goods in the late evening of December 14th, knew they had been stolen, and whether, after he had knowledge that the goods were stolen, he aided in the concealment of them. So that there are really two questions for you to decide: first, whether or not at the time the defendant received the goods he knew they were stolen and, therefore, violated the law I have just read to you in receiving stolen property knowing it to be stolen, and the second question whether, if the defendant did not at the time he received the goods in question know they were stolen, he aided in concealing the goods after he had become informed that they were stolen."

The jury returned this verdict: "We, the jury herein, find the defendant guilty in manner and form as charged in the information (on the second charge)." From a colloquy which occurred between the court and the foreman of the jury it was clearly made to appear that the jury acquitted defendant of knowingly receiving stolen goods, but found him guilty of concealing them after he knew they were stolen. It is contended the verdict is insufficient to sustain a conviction. The statute includes the two substantive offenses, that of knowingly receiving stolen goods and that of concealing goods known to have been stolen at the time of concealment. Such offenses, when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense. *Byrne v. State,* 12 Wis. 519; *Clifford v. State,* 29 Wis. 327. And a verdict finding defendant guilty of one of such substantive offenses is a valid verdict.

3. Upon the trial the value of the goods in question was stipulated to exceed $20; the proof showed that the wholesale value of the goods returned exceeded $20, and no request to charge on the subject of value was made by defendant's counsel. Under such circumstances the argument that there is no finding that the value of the goods concealed exceeded $20 has no force.

4. The goods were received, as charged in the information, on the 14th of December, but the concealment with knowledge that they were stolen did not take place till the last of the month. There is no fatal variance between the charge and the proof. In such cases the precise date charged need not be proved. It is sufficient that the date proved corresponds substantially with the charge. Here the defendant received the goods on the 14th of December and retained them in his possession till about the 7th or 8th of January following. The district attorney properly charged the date of receipt.

We have carefully read the evidence and are convinced that it not only sustains the verdict rendered but that it would sustain a conviction for knowingly receiving stolen goods.

By the Court.—Judgment affirmed.

LAUERMAN BROTHERS COMPANY, Respondent, vs. NATIONAL SURETY COMPANY, Appellant.

September 12—December 5, 1916.

Principal and surety: Agreement to pay debts.

A finding by the jury that the defendant surety company promised to assume and pay the debts of one R. upon conveyance to it of all his property to protect it on its liability on its bond as surety, is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action upon a promissory note executed and delivered to the plaintiff February 6, 1909, by one H. L. Roe. The complaint charges that in consideration of the transfer by said Roe of all his property to the defendant it agreed to pay all debts of Roe and that upon learning of said agreement plaintiff accepted the same. Roe was town treasurer and the de-

fendant was surety on his bond. The jury by a special verdict found that the defendant promised Roe that if he transferred all his property to it, to protect it on its liability on its bond as surety, it would assume and pay all his debts and obligations. Judgment in favor of plaintiff was entered upon such verdict and the defendant appealed.

Henry T. Scudder, for the appellant.

P. A. Martineau, for the respondent.

The following opinion was filed October 3, 1916:

VINJE, J. The only question litigated upon the trial was whether or not the defendant made the promise to pay Roe's debts upon the conveyance to it of his property to indemnify it against loss on its surety bond. Defendant's counsel makes the claim on appeal that the agreement was for an absolute conveyance, and that since no such conveyance was made defendant is not liable. The evidence does not sustain such claim. Mr. Roe and his attorney, Mr. Walsh, who made the agreement with the defendant, both testify that the conveyance was for the purpose of protecting the defendant against loss on its bond; and Mr. Chaflin, who made the agreement on behalf of defendant, testified in answer to the question, "You got all the property and the ownership of all that property?" "Yes, to be held in trust until he could pay us." In another place he states: "The difference between the testimony of Mr. Roe and Mr. Walsh and myself is that I deny that we promised to pay the debts." There was no issue made by the pleadings on the question of absolute conveyance and none by the evidence. As before stated, the only litigated fact was whether or not defendant promised to pay Roe's debts. Upon this question the evidence was conflicting. Roe and Walsh testify that such a promise was made and Chaflin denied it. Such being the state of the evidence, the finding of the jury, sustained by the trial court, cannot be set aside.

The claim that all of Roe's property was not conveyed is not sustained by the evidence. Roe testifies that it was all conveyed and Chaflin admits it in the testimony quoted above, and the court so found. The other assignments of error as to the admission or rejection of evidence are not deemed of sufficient importance to merit treatment. The real litigated question having been found against the defendant upon sufficient testimony to sustain the finding, the trial court properly awarded judgment to plaintiff.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $10 costs, on December 5, 1916.

KAUFMANN, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

September 12—December 5, 1916.

Railroads: Collision at highway crossing: Failure to give statutory signals: Positive and negative testimony: Questions for jury: Gross negligence: Injury to property: Slight negligence: Special verdict: Omissions: Presumption.

1. In an action against a railway company for injuries sustained in a collision at a highway crossing the evidence is *held* to sustain findings by the jury that the bell on the engine was not rung or the whistle blown as required by law.
2. Testimony that they heard no bell or whistle, given by witnesses who, knowing that a train was due, were listening for it, is not merely negative.
3. It cannot be said as a matter of law that two men riding in an automobile driven at low speed down a slight grade are in such a position that they cannot hear the whistle and bell of an approaching train at a distance of eighty rods.
4. Plaintiff was not guilty of gross negligence in failing to apply his emergency brake or in failing to adopt other possible means of escape from a dangerous situation created by the negligence of the defendant.

5. Even if sub. 6, sec. 1809, Stats., applies only to claims for personal injuries or death—a point not decided,—yet in an action for injuries to person and property where the jury found that plaintiff was not guilty of gross negligence and the defendant railway company made no request for a finding as to any other degree of negligence on plaintiff's part, it will be presumed, under sec. 2858*m*, in support of a judgment by which plaintiff recovered for the injury to property, that the trial court found that he was not guilty of a slight want of ordinary care.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

This action was brought to recover damages to person and property, caused when an automobile driven by the plaintiff collided with a train of the defendant at Lena on February 21, 1915. Judgment was entered in favor of the plaintiff for $1,180.34, and the defendant appeals. The case was submitted to a jury on a special verdict. The jury found as follows: (1) Plaintiff received injuries to his person at the time and place alleged. (2) The whistle was not blown eighty rods south of the crossing in question. (3) The failure to blow the whistle was a proximate cause of the injuries sustained. (4) The bell was not rung continuously from a point eighty rods south of the crossing until the train stopped. (5) The failure to so ring the bell was a proximate cause of the injuries sustained. (6) The plaintiff was not guilty of gross negligence in attempting to cross the track at the time and place in question. (7) The amount of damages to the person of the plaintiff was $700. (8) The amount of damages to the automobile was $400.

For the appellant there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *Allan V. Classon,* and oral argument by *Mr. Killilea.*

For the respondent there was a brief by *John B. Chase* and *Classon & O'Kelliher,* and oral argument by *V. J. O'Kelliher.*

The following opinion was filed October 3, 1916:

ROSENBERRY, J. Substantially the only question is whether or not there was sufficient evidence to sustain the findings of the jury as to the blowing of the whistle and the ringing of the bell. Without entering into a lengthy statement of the facts, it appeared by the testimony of four employees of the defendant company that the bell was rung and the whistle was sounded as required by law. On the part of the plaintiff it appeared that he and his companion, at a point 150 feet from the railway track, stopped, looked and listened for the approaching train, and then proceeded toward the track down a slight grade at low speed in plaintiff's automobile, still looking and listening for the train, and that they heard no bell or whistle. It appears quite conclusively that if the whistle was sounded and the bell rung at a point eighty rods from the crossing it was done at a time when plaintiff and his companion were approaching the railway track. Plaintiff and his companion having had their attention called to the fact that the train was due were then listening for the train, therefore their testimony cannot be said to be merely negative. It cannot be said as a matter of law that two men riding in an automobile driven at low speed down a slight grade are in such a position that they cannot hear the whistle and bell of an approaching train at a distance of eighty rods. There being a conflict in the evidence, the question was correctly submitted to the jury, who found the defendant negligent.

The negligence of the defendant being established, the plaintiff was not guilty of gross negligence in failing to apply his emergency brake or in failing to adopt other possible means of escape from a dangerous situation created by the negligence of the defendant.

By the Court.—Judgment affirmed.

The following opinion was filed December 5, 1916:

ROSENBERRY, J. Plaintiff had judgment for $1,100, $700 of which was for injuries to his person and $400 for injuries to his automobile. Appellant moves for a rehearing upon the ground that under sec. 1809, Stats., negligence of the plaintiff less than gross negligence bars a recovery for injuries to property, and alleges that plaintiff was guilty of such negligence. Appellant argues that sub. 6, sec. 1809, Stats., applies only to claims for *personal injuries or death;* that plaintiff, being guilty of want of ordinary care, cannot recover for injuries to his automobile. The question is not presented by this record. Appellant made no request for a finding as to any other degree of negligence of the plaintiff than gross negligence. Under sec. 2858*m*, Stats., it must be presumed, even if the construction claimed by appellant be given to sub. 6, sec. 1809, that the trial court found upon that question adversely to the appellant, that plaintiff was not guilty of a slight want of ordinary care. Upon the record we cannot say that such finding is not sustained by the evidence.

Upon this motion appellant reargues the question as to the sufficiency of the evidence to sustain the finding of the jury to the effect that the whistle was not blown and the bell was not rung. After a careful re-examination of the record we see no reason for modifying our former conclusion.

By the Court.—Motion denied, with $25 costs.

STATE, Respondent, vs. LEWIS, Appellant.

October 5—December 5, 1916.

Appealable orders: Striking out parts of pleading: Criminal law and practice: Former jeopardy: Physicians and surgeons: Revocation of license to practice.

1. An order of the circuit court striking out portions of an answer is not appealable.
2. The doctrine of former jeopardy applies only as to criminal proceedings.
3. A judgment in a criminal proceeding is neither a bar to a subsequent civil proceeding involving the same state of facts, nor is it proof of anything in the later proceeding except of the fact of conviction.
4. Thus, the acquittal of a physician, in a criminal action, of the charge of having performed an abortion is no bar to a subsequent civil proceeding under secs. 1436*e*, 1436*f*, Stats., to revoke, on the same charge, his license to practice medicine. The fact that under sec. 1435*i* revocation of his license would have followed a conviction in the criminal action does not change from civil to criminal the nature of the proceeding under secs. 1436*e*, 1436*f*.

APPEAL from orders of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Dismissed as to one order; the other order affirmed.*

The appeal is from two orders, one striking out certain portions of defendant's answer and the other sustaining a demurrer to a part of said answer.

The proceedings in this case are instituted under secs. 1436*e* and 1436*f*, Stats., to revoke and annul the license granted to the defendant to practice medicine and surgery within the state of Wisconsin. In the complaint he is charged with having procured, aided, and abetted a criminal abortion upon a pregnant woman and that as a result thereof the woman died.

The portion of the answer demurred to interposed as a defense to these proceedings an allegation to the effect that the defendant had been tried in the municipal court of Milwau-

kee county for the same offense above specified, and upon such trial judgment had been rendered in his favor; and that demurrer was sustained.

The defendant further alleged that the prosecution upon which the complaint herein is based is actuated by malice and ill will toward defendant. It is this portion of the answer that was stricken out by the circuit court. A motion was made in this court to dismiss the appeal from the order striking out this paragraph on the ground that such is not an appealable order.

For the appellant there was a brief by *Frank H. Hanaford* and *Charles S. Thompson,* and oral argument by *Mr. Thompson.*

For the respondent there was a brief by *A. C. Umbreit,* counsel, and *Winfred C. Zabel,* district attorney for Milwaukee county, and oral argument by *Mr. Umbreit.*

The following opinion was filed October 24, 1916:

ESCHWEILER, J. The motion to dismiss the appeal from the order striking out the allegation in defendant's answer that the proceedings herein are actuated by malice and ill will must be granted. Such an order is not one subject to review by this court by direct appeal therefrom. Sec. 3069, Stats.; *Wiesmann v. Shanley,* 124 Wis. 431, 102 N. W. 932; *Gooding v. Doyle,* 134 Wis. 623, 115 N. W. 114.

By sec. 5, ch. 426, Laws 1903, there was incorporated into the law and made a part of what is now sec. 1435*i,* Stats., the following provision:

"If any person licensed or registered by said board [*i. e.* of medical examiners] shall be convicted of any crime, committed in the course of his professional conduct, the court in which such conviction is had shall in addition to any other punishment imposed pursuant to law revoke such license or certificate."

The defendant contends that, since these proceedings are instituted for the canceling or revoking of his license and the

same canceling and revoking could have been done in the proceedings in municipal court in case of his conviction, pursuant to the above quoted provision of sec. 1435*i*, he is now in effect being put in second jeopardy. He also contends that in any event the judgment of acquittal in the municipal court may be pleaded as a bar to these proceedings.

These proceedings are declared by the express language of the legislature to be civil proceedings. "Sec. 1436*e*. . . . Such action shall be commenced and prosecuted as a civil action in the name of the state of Wisconsin as plaintiff, and against such person complained against as defendant, and the rules of pleading, evidence and practice in civil actions in the circuit court shall be applicable thereto, and either party may appeal from the circuit court to the supreme court as in other civil actions."

They have been so held by this court in the case of *State v. Schaeffer,* 129 Wis. 459, 109 N. W. 522. While nothing is said in that decision with reference to the above quoted portion of sec. 1435*i* relied upon by defendant, although the same was then in the law, yet it was there determined that this is a civil action and not one which imposes a penalty or prescribes a forfeiture. The effect of the above quoted portion of sec. 1435*i*, therefore, is simply to give, as an incident to such conviction, power to the court in the criminal proceeding to do directly and forthwith what might be done in subsequent civil proceedings. It therefore does not change the nature of the proceedings now before us from civil to criminal, and unless it does so change their nature there can be no application of the doctrine of former jeopardy, for that applies only as to criminal proceedings. *Brown v. Swineford,* 44 Wis. 282; *State v. Shevlin-Carpenter Co.* 99 Minn. 158, 108 N. W. 935, 938; *Stout v. State ex rel. Caldwell,* 36 Okla. 744, 767, 130 Pac. 553. We must therefore hold that by the present proceedings the defendant is not put in jeopardy for a second time for the same charge upon which he was acquitted in the proceedings in the municipal court.

On the second question which is urged in this case and in the case of *State v. Little, post,* p. 367, 159 N. W. 747, that the acquittal in the criminal prosecution of the charge of abortion may be pleaded in bar to these civil proceedings, we are of the opinion that the difference between the criminal proceedings and these is such that the general well recognized rule applies, namely, that a judgment in a criminal proceeding is neither a bar to a subsequent civil proceeding involving the same state of facts, nor is it proof of anything in such subsequent civil proceedings except of the fact of conviction. *State ex rel. Shea v. Evenson,* 159 Wis. 623, 626, 150 N. W. 984; *Stone v. U. S.* 167 U. S. 178, 189, 17 Sup. Ct. 778; 23 Cyc. 1348; *Micks v. Mason,* 145 Mich. 212, 215, 108 N. W. 707, 11 L. R. A. N. S. 653; *U. S. v. Donaldson-Shultz Co.* 148 Fed. 581; *State v. Roach,* 83 Kan. 606, 611, 112 Pac. 150; *State v. Corron,* 73 N. H. 434, 448, 62 Atl. 1044.

The same question raised here as affecting a physician's right to practice has been raised and held of no force in proceedings for disbarment of an attorney. *People ex rel. Colo. Bar Asso. v. Weeber,* 26 Colo. 229, 230, 57 Pac. 1079; *People ex rel. Colo. Bar Asso. v. Thomas,* 36 Colo. 126, 91 Pac. 36; *In re Thresher,* 33 Mont. 441, 84 Pac. 876; *In the Matter of* ——, 86 N. Y. 563.

Proceedings such as these are not in their nature an effort to further punish one who may already have been punished for the same offense, but are a rightful exercise of the power of the state to protect its citizens from physicians of bad character. *Hawker v. New York,* 170 U. S. 189, 196, 18 Sup. Ct. 573. The trial, therefore, of defendant in this action does not amount to substantially the same thing as a new trial in a criminal prosecution after an acquittal in it, as was the situation in the case much relied upon by defendant of *Coffey v. U. S.* 116 U. S. 436, 443, 6 Sup. Ct. 437. That case has no application here. The court below was justified in sustaining a demurrer to that part of the answer which

attempted to interpose as a defense the acquittal of defendant in the municipal court.

By the Court.—The appeal from the order striking out part of the answer is dismissed and the order sustaining the demurrer to a part of the answer is affirmed, and the cause remanded for further proceedings.

A motion for a rehearing was denied, with $25 costs, on December 5, 1916.

STATE, Respondent, vs. LITTLE, Appellant.

October 5—October 24, 1916.

State v. Lewis, ante, p. 363, followed.

APPEAL from orders of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Dismissed as to one order; the other order affirmed.*

The appeal is from two orders of the circuit court, one striking out certain portions of defendant's answer and the other sustaining a demurrer to a part of said answer.

For the appellant there was a brief by *Rubin, Fawcett & Dutcher*, attorneys, and *Paul R. Newcomb*, of counsel, and oral argument by *Mr. Newcomb.*

A. C. Umbreit, counsel, and *Winfred C. Zabel*, district attorney for Milwaukee county, for the respondent.

ESCHWEILER, J. The situation presented and the questions raised in this case are the same in substance as those in the case of *State v. Lewis, ante*, p. 363, 159 N. W. 746. What is said in that case applies here and the same judgment should follow.

By the Court.—The appeal from the order striking out part of the answer is dismissed and the order sustaining the demurrer to a part of the answer affirmed, and the cause remanded for further proceedings.

PIETSCH and another, Trustees, Appellants, vs. MARSHALL & ILSLEY BANK, Respondent.

October 24—December 5, 1916.

Trusts and trustees: Intention to create trust: Testamentary instrument: Active trust: Validity.

1. A written instrument by which the grantor transferred and conveyed to designated trustees, and to the survivor of them, all her property, real and personal, "in trust, nevertheless, upon the express trusts following;" which gave to such trustees authority to collect all rents, insurance, mortgages, interest, and other property of the grantor, to convert all into money, and to invest and reinvest the same; which provided that the net income of the property should be paid over to the grantor during her life, and that twice in each year the "trustees shall render an accounting of their stewardship" to her; which recited that the grantor had also delivered in escrow a deed of her real estate, to be delivered after her death to the trustees, who were then to sell the same and distribute the proceeds "according to the trust herein provided for;" and which then directed the trustees, after payment of her debts and funeral expenses, to pay certain specific sums to persons named and to distribute all the residue of her estate in equal shares among her six children,—is *held* to have created a valid, active trust within the meaning of sec. 2074, Stats., for purposes authorized by sub. (5), sec. 2081, and not to have been intended merely as a testamentary disposition of the property, although some of the phraseology of the instrument might indicate the latter intention.

[2. Whether, under the provisions of such instrument, the real estate is to be deemed personal estate for the purposes of the trust, not determined.]

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This is an action to recover the balance of bank deposits from the defendant, which it is alleged was assigned to plaintiffs by the execution of the following written instrument, executed by one Mathilde Pietsch on the 31st day of July, 1915:

"Whereas, Mathilde Pietsch, of sound mind and memory, is aged and is desirous of keeping her property intact until

her death, and wishes to be relieved from the cares and responsibilities connected therewith, and also is desirous of making disposal thereof upon her death. For the purpose of carrying out her intentions, said Mathilde Pietsch *hereby sells, assigns, sets over, grants and conveys to her daughter Doretta Pietsch, and to her son Ferdinand Pietsch, and to the survivor of them, all her property, real and personal, in trust, nevertheless, upon the express trusts following,* and hereby revoking all former disposals of a testamentary character, or otherwise; *and the said Doretta Pietsch and Ferdinand Pietsch hereby accept such property upon the trusts as herein expressed:*

"1. Power and authority is hereby given to the trustees, or to the survivor of them, *to gather in, collect, sue for, all rents, insurance, mortgages, interest and other property of every kind and nature, of the said Mathilde Pietsch, and convert all into money and to invest and reinvest same in securities as said trustees shall deem meet and proper.*

"2. For and during her natural life, said Mathilde Pietsch *is to receive the use and income of said property,* the net income of which is to be paid over to said Mathilde Pietsch upon her request, and at such times as she may desire.

"3. On the first day of January and July of each year, trustees shall render an accounting of their stewardship to said Mathilde Pietsch.

"4. There is also assigned to said trustees upon the trusts herein expressed, life insurance policy No. 73430, dated July 22, 1867, in the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, for twenty-two hundred dollars ($2,200), subject to a note against it, held by said company, and *there is also assigned to said trustees all moneys which said Mathilde Pietsch may have in banks.*

"5. Said Mathilde Pietsch has this day also delivered in escrow, to be held by Frederick M. Wilmanns until her death, and then to be delivered to her trustees, a deed of all her real estate . . . [description of real estate omitted], subject to the lawful incumbrance thereon, and in which said deed the trustees are the grantees, and which said real estate the trustees, after the death of said Mathilde Pietsch, are to sell and dispose of at such price and upon such terms and conditions as they may deem just and proper, and distribute the proceeds according to the trust herein provided for.

"6. Out of the personal property or the proceeds thereof coming to the hands of said trustees, and all other personal property which said Mathilde Pietsch may have an interest in at the time of her death, said trustees are ordered and directed to pay as soon as may be convenient, after payment of said Mathilde Pietsch's just debts and funeral expenses, as follows: . . . [small gifts omitted—(a) to (e).]

"7. All the rest, residue and remainder of my estate, I order and direct my said trustees, or the survivor of them, to distribute same in equal shares among my six children, *Doretta Pietsch, Ferdinand Pietsch,* Mathilde Mayer, *née* Pietsch, Lena Plats, *née* Pietsch, Albert Pietsch and Hugo Pietsch, or their heirs. For the purpose of converting my property into money and to make distribution as aforesaid, I authorize and empower my trustees to take whatever steps they may deem necessary to accomplish the purpose. It being distinctly understood that no distribution is to be made until after my death. Should any question arise in the execution of the trust, power and discretion is given to my trustees, and to the survivor of them, to act as they think best, confident that my trustees will act for the best interest of all concerned.

"In witness whereof, the said Mathilde Pietsch has hereunto set her hand and seal this 31st day of July, 1915, and the said *Doretta Pietsch* and *Ferdinand Pietsch* have also hereunto set their hands and seals on the same day, and accept the trusts as created and declared herein.

"Mathilde Pietsch. (Seal.)
[Attestation clause] "Doretta Pietsch. (Seal.)
"Ferdinand Pietsch. (Seal.)"

The foregoing instrument was witnessed and also acknowledged by Mathilde Pietsch, *Doretta Pietsch,* and *Ferdinand Pietsch* before a notary. An addendum to the trust instrument was executed by Mathilde Pietsch on the same day wherein she enumerated a few more small gifts. This addendum was also signed by *Doretta Pietsch* and *Ferdinand Pietsch.*

Mathilde Pietsch died on March 1, 1916. At the time she executed the foregoing instrument she had a savings account

with the defendant, and after crediting the interest up to January 1, 1916, the account shows a balance of $2,432.53, and on the checking account a balance of $16.17. The plaintiffs have repeatedly demanded payment of these sums from the defendant, but defendant has and still does refuse to pay the same to the plaintiffs. It was stipulated in open court that plaintiffs gave defendant proper notice of the assignment of the bank accounts under this writing before the commencement of this action.

The defendant demurred to the complaint and the circuit court sustained such demurrer. This is an appeal from the order sustaining the demurrer.

Moritz Wittig, for the appellants.

For the respondent there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

SIEBECKER, J. The primary question presented by the demurrer is, What is the legal effect of this written instrument? In ascertaining the answer it is to be presumed that the terms of the instrument were employed to effect a purpose the law sanctions concerning a transfer of the property of Mathilde Pietsch. Many of the phrases used in connection with the effective parts of the instrument are probably the product of the scrivener's habit of employing ancient and superfluous terminology in legal writings and others are manifestly the mere expression of the motives of the maker of the instrument. These parts of the writing, however, are not out of harmony with the provisions of the writing which evince the intent and purpose of the maker. The essential and effective parts of the instrument are that Mathilde Pietsch thereby "sells, assigns, sets over, grants and conveys to her daughter *Doretta Pietsch,* and to her son *Ferdinand Pietsch,* and to the survivor of them, all her property, real and personal, in trust, nevertheless, upon the express trusts following, . . ." and the daughter and son "accept such

property upon the trusts as herein expressed." The instrument provides that "power and authority is hereby given to the trustees, or to the survivor of them, to gather in, collect, sue for, all rents, insurance, mortgages, interest and other property . . ." belonging to her and "convert all into money and to invest and reinvest same in securities as said trustees shall deem meet and proper." By other provisions the grantor is to receive the income of this property during her life, and the trustees are to pay her the net income thereof at such times as she demands and make a semi-annual "accounting of their stewardship" to her. Assignments of a life insurance policy and of her money in banks are specifically made to such trustees as such, and at the time of executing this instrument she executed a deed conveying to the trustees in trust all her real estate, which was delivered to one Wilmanns to be held by him "until her death, and then to be delivered to her trustees, . . ." and the trustees are directed after her death "to sell and dispose" thereof as they deem fit and proper "and distribute the proceeds according to the trust herein provided for." The instrument then directs "the trustees," after payment of her debts and funeral expenses, to pay to the persons named in the instrument certain specific sums, and the rest and residue of the estate they are directed to distribute in equal shares among her six children.

It is well established that a trust may be created by an instrument in writing subscribed by the creators of the trust, if the intention is clear to create a trust for the purposes authorized in the law. The purposes as expressed in this instrument are reasonably clear to the effect that the grantor of the property did presently transfer and convey all her real and personal property to her daughter and son as trustees. She also supplemented such transfer by the execution of a deed contemporaneously therewith which she delivered in escrow. The result of this transfer was that the designated trustees took title and possession of the estate and became

vested with the authority to manage it, to collect the rents, interests, and profits thereof and pay her the net proceeds during her life, and then to execute the trust by paying and distributing the estate pursuant to the express provisions of the instrument. The statute, sec. 2081, Stats. 1915, provides:

"Express trusts may be created for any or either of the following purposes: . . .

"(5) For the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time and the exceptions thereto relating to literary and charitable corporations prescribed in this title."

We are of the opinion that the provisions of this instrument fully express and clearly define a trust, in that it constitutes a conveyance of the trustor's real and personal property to the designated trustees for the purposes of having the rents and income thereof paid to her during life, and at her death the *corpus* of the trust estate is to go to the persons she has selected as her beneficiaries. These are legitimate objects within the law of trusts in this state. Such conveyances of real estate in trust are valid if the trust is an active one within the contemplation of sec. 2074, Stats. We need not consider whether or not, under the provisions of this trust instrument, the real estate is to be deemed personal estate for the purposes of this trust, because it is manifest that such real property can properly be made a part of an active trust. That the trust is an active one is shown by the facts that the trustees are charged with the active duties of managing all the property of the trust, to collect all rents, interests, and profits thereof and to invest and reinvest the same and pay out of the net proceeds the sums due to the trustor under the conditions of the writing creating it. These are very important and active continuing duties during the existence of the trust. *Goodrich v. Milwaukee,* 24 Wis. 422;

Perkins v. Burlington L. & I. Co. 112 Wis. 509, 88 N. W. 648. In *Schumacher v. Draeger,* 137 Wis. 618, 119 N. W. 305, a trust of this nature was recognized as within the statutes, but the trust in that case failed because it came within the provision of sec. 2073, Stats. Here the possession of the *corpus* of the estate and the receipts, rents, and profits thereof vest in the trustees in trust for the benefit of the trustor during her life and thereafter to hold it in trust for the benefit of the persons designated in the trust instrument. It is to be noticed that the provision of sub. (5), sec. 2081, Stats., is not found in the statutes of New York, and hence the decision under the New York statute is not of controlling force in cases where this subdivision of our statute applies. *White v. Fitzgerald,* 19 Wis. 480; *Goodrich v. Milwaukee, supra.*

The circuit court sustained the demurrer to the complaint apparently upon the ground that the contents of this writing show that Mathilde Pietsch intended it as a testamentary disposition and not as an express trust. The court in its decision declared its doubts in arriving at this conclusion. While some of the phraseology in which the instrument is couched gives weight to this idea, we are convinced that it was not intended to be a testamentary disposition of the maker's property. The effective parts of the instrument to which we have called attention above clearly and expressly constitute a valid trust and all the other phraseology used in connection therewith is readily harmonized with that intent and object. It is considered that the complaint, supplemented by the stipulated fact that the defendant bank had the required notice of the execution of the trust instrument before action was begun, states a good cause of action and that the demurrer thereto should have been overruled.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

WATERSON, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

October 26—December 5, 1916.

Railroads: Injury to person at street crossing: Negligence: Contributory negligence: Duty to look and listen: Gates: Flagman: Invitation to cross: Questions for jury.

1. In an action for injuries to a person who was struck by an engine at a railway street crossing in a city, if the speed of the engine did not exceed that prescribed by sec. 1809, Stats., and the only negligence on the part of the defendant railway company was the failure of the flagman to give reasonable warning, a lack of ordinary care on the part of plaintiff is a complete defense.
2. The rule requiring a traveler on a highway, when he approaches a railway track, to look and listen at the last opportunity before entering the zone of danger does not apply to its full extent where an affirmative invitation to cross is given by the railway company.
3. As plaintiff approached, at night, the place where a city street crossed three railway tracks he saw the gates were up, with lighted lanterns hanging on them as if they were in use. Freight cars were standing on the first track, and as he passed these he looked in both directions but did not see or hear anything approaching. As he was crossing the third track he was struck by an engine which was running backwards. The gates were, in fact, not in operation, and a flagman stationed at the crossing gave no warning until plaintiff was very close to the third track. *Held*, that it was a jury question whether plaintiff was negligent in not continuing to look until he had crossed all the tracks.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Personal injuries. The action was brought in the civil court of Milwaukee county. The plaintiff was struck by a switch engine operated by the defendant while he was crossing its tracks at their intersection with Vliet street in the city of Milwaukee. Vliet street runs east and west, and the defendant maintains three tracks which cross the street in a northeasterly and southwesterly direction. The easterly track is a sidetrack, and box freight cars stood upon it close to

the walk on the north side of Vliet street. The other two tracks are main tracks, the center track being used for north-bound traffic and the westerly track for south-bound traffic. The plaintiff, an adult, approached the tracks from the east at about 1 o'clock a. m. on the north side of Vliet street. He was accompanied by two adult companions with whom he was talking. The distance from the westerly rail of the sidetrack to the westerly rail of the westerly track is about forty-four feet. Gates are maintained at this crossing, but they were not in operation on the night in question because the gateman (who regularly operated the gates by means of an air pump from a small tower) was ill, and a flagman with a lantern was sent to the crossing to warn passengers of approaching trains. The night was very dark. As the plaintiff approached the crossing the gates were up with lighted lamps hanging upon them. Plaintiff testified that as he passed the box cars he noticed that the gates were up and that the lamps were lighted; that he saw no flagman, heard no signals; that he looked north just as he passed the box cars and then looked south and saw nothing coming, and did not look again; that he heard no engine approaching, but just as they were crossing the last or westerly track one of his companions shouted and the engine approaching from the north was upon them and they all jumped, and the coal box of the tender struck the plaintiff in the back. The plaintiff's companions testified that they noticed the gates were up, that they looked to north and south after passing the box cars and saw no train, and that they heard no warning until just as the engine was upon them. One testified that he saw the flagman walking over toward a saloon, but the other testified that he saw no flagman. There was evidence on the part of the plaintiff that there were no lights on the engine and that no bell or whistle was sounded as the engine approached the crossing. On the part of the defendant there was testimony that after passing the box cars the engine could be seen about 900 feet to the north; that the engine was running backwards, and that as it approached the

crossing its bell was ringing, and that it had on the back of the tender a regular headlight with two red lights lighted; that the whistle was blown about 300 feet from the crossing. The flagman testified that he hollered to the men as they were crossing the easterly main track and again just before they were struck. The jury returned the following special verdict:

"(1) Was the plaintiff injured by being struck by defendant's switch engine at the time and place alleged in the complaint? *A.* (by the court, by consent of counsel). Yes.

"(2) At what rate of speed was the engine going at the time it struck the plaintiff? *A.* Twenty miles.

"(3) If in answering question 2 you find the speed to have been greater than thirty miles per hour, then answer this question: Was such speed the proximate cause of plaintiff's injury? *A.* ——.

"(4) Was the plaintiff guilty of gross negligence in attempting to cross said tracks under the circumstances? *A.* No.

"(5) Did the man acting as flagman give reasonable warning to the plaintiff of the approaching train? *A.* No.

"(6) If you answer question 5 'No,' then answer this question: Was such failure to give reasonable warning the proximate cause of plaintiff's injury? *A.* Yes.

"(7) Ought the plaintiff to have either seen or heard the engine in time to have avoided coming in contact with it? *A.* No.

"(8) Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? *A.* No.

"(9) If the court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $1,000."

The civil judge changed the answers to questions 7 and 8 from "No" to "Yes" and entered judgment for the defendant. Upon appeal the circuit court restored the verdict as returned by the jury, reversed the judgment, and entered judgment for the plaintiff upon the verdict, from which judgment this appeal is taken.

For the appellant there was a brief by *C. H. Van Alstine,*

H. J. Killilea, and *R. M. Trump,* and oral argument by *Mr. Trump.*

For the respondent there was a brief by *Lehr & Kiefer,* attorneys, and *J. Elmer Lehr,* of counsel, and oral argument by *J. Elmer Lehr.*

WINSLOW, C. J. Sec. 1809, Stats., provides, among other things, that if a railroad company "shall erect, maintain and operate" gates at a city highway crossing, or "shall maintain a flagman thereat," it may run a train or locomotive at a speed not exceeding thirty miles an hour over such crossing, otherwise not at greater speed than twelve miles an hour, unless it maintains an electric alarm bell at the crossing, in which case the speed may be not exceeding twenty miles an hour. The section further provides that, if injury or death is caused by failure to comply with these provisions, slight want of ordinary care on the part of the person killed or injured shall not bar a recovery.

Assuming, without deciding, in the present case that the defendant satisfied the requirements of the statute by placing a flagman at the crossing when the gates were not in operation and hence was guilty of no negligence in operating its locomotive at any speed not exceeding thirty miles an hour, then the only negligence shown or found on the part of the defendant is the negligence of the flagman in not giving reasonable warning of the approach of the engine, and as against such negligence the lack of ordinary care on the part of the traveler is a complete defense.

The crucial question, therefore, is whether such a lack was shown as matter of law or whether the question was one for the jury.

The appellant relies upon the well established principle that it is the duty of a traveler to look and listen when he approaches a railway track at the last opportunity before entering the zone of danger, and that such a circumstance as

gates being raised, which are customarily lowered when a train is about to pass, does not excuse failure to perform his duty. *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148, and cases cited.

The civil judge applied this rule to the case and held that the evidence demonstrated that the plaintiff did not look at the last opportunity before entering the zone of danger.

We have no disposition to question this rule, but surely it cannot apply to its full extent where an affirmative invitation to cross is given to the traveler by the railroad company. If one approaches a crossing where a flagman is stationed and there are a number of tracks and receives from the flagman a signal to cross, he certainly cannot be obliged to exercise the same abundant caution until he has crossed the last track that he would if he had received no signal. If so, why have the flagman at all? In the present case the facts were not merely that the gates were up, but that there were lanterns hanging on them just as if they were in use. The plaintiff testified that he saw these lanterns. They doubtless conveyed the impression to his mind that the gates were in operation but were elevated because no train was approaching. The flagman gave no warning until the plaintiff was very close to the track on which the engine was approaching. Under such circumstances it seems to us that the plaintiff might well believe that an affirmative assurance of safety had been given him by the railroad company and that ordinary care did not require him to look in either direction after his first look when he passed the freight car. We are not to be understood as intimating that the plaintiff could be excused from looking at least once as he entered upon the crossing, but after having so looked and seeing nothing, we think it was fairly a jury question whether ordinary care required him to keep on looking until he had crossed all the tracks, in view of the seeming assurance of safety which the uplifted gates bearing lanterns and the lack of warning by the flagman gave him.

We think the testimony of the plaintiff that he did look as soon as he passed the freight car and saw nothing is not incredible in view of the other testimony in the case as to the lack of lights on the engine and signals therefrom.

By the Court.—Judgment affirmed.

ERTEL, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent, and another, Appellant.

October 27—December 5, 1916.

Bringing in new parties: Discretion: Personal injuries: Joint wrongdoers: Execution: Issues between defendants: Contribution: Res judicata: *Pleading: Evidence: Remarks of counsel: Harmless errors.*

1. The application of a defendant to have a third person, who would be liable over to the applicant, made a party defendant under sec. 2610, Stats., is addressed to the sound discretion of the court; and in this action, wherein the applicant (a corporation) was sought to be held liable for negligence of its servant, refusal to make the servant a party was not an abuse of such discretion.
2. Where a recovery is had against two defendants for injuries found to have been caused by negligence of both, the plaintiff may satisfy his claim out of either.
3. Where plaintiff was injured in a collision between a street car operated by the defendant electric company and a wagon driven by an employee of the defendant fuel company, and the jury found that the negligence of both defendants proximately caused the injury, the court properly denied the motion of the defendant fuel company to have the judgment direct the execution to be first satisfied out of the property of the defendant electric company.
4. The question whether either of said defendants would be entitled to contribution from the other being a matter with which they only are concerned, it was not involved in this case, and the trial court properly refused to allow the fuel company to amend its answer so as to allege that the question of the negligence of its driver was *res judicata*, or to put in evidence the verdict and

judgment in an action by its driver against the electric company for injuries sustained in the collision, wherein it was determined that the driver was not guilty of any want of ordinary care that contributed to his injuries.

5. It was error to refuse to permit the driver to answer a question, asked by counsel for the fuel company, as to whether, when he approached the tracks to drive across, he saw the car and thought that he could cross in safety; but such error does not constitute ground for reversal, the testimony of the driver, taken as a whole, clearly indicating that he claimed he did see the car and thought he could pass the tracks in safety.

6. The fact that in the taking of certain affidavits the defendant fuel company was represented by an insurance company having been called out in connection with the introduction of the affidavits by the fuel company, the error in permitting counsel for the defendant electric company to comment upon the fact that an insurance company was interested in the defense was not a material one, prejudicial to the fuel company, where the trial court admonished and instructed the jury so that they clearly understood that such remarks of counsel were to be disregarded.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

It appears from the complaint that on December 5, 1914, at 6 o'clock p. m., plaintiff was waiting at the northeast corner of the intersection of Third and Poplar streets in the city of Milwaukee intending to board one of the cars of the defendant *Milwaukee Electric Railway & Light Company* (hereinafter called the *Electric Company*), which was then approaching the street intersection, running in a northerly direction on the east side of Third street; that at the same time an employee of the defendant *Milwaukee Western Fuel Company* (hereinafter called the *Fuel Company*) was driving a team of horses attached to a large coal wagon easterly on Poplar street, intending to cross the street railway company's tracks; that while the team of the *Fuel Company* was crossing the tracks it was hit with great force and violence by the approaching street car, causing the wagon to be thrown against plaintiff, seriously injuring him, he suffering a fracture of the skull and injury to his sight. The *Electric Company* an-

swered denying any negligence on its part and alleging that the collision was due solely to the negligence of the driver of the coal wagon. The *Fuel Company* answered denying negligence on its part and alleging that the injury was caused solely by the negligence of the *Electric Company's* employees.

It further appears that John Muth, who was the driver of the wagon owned by the *Fuel Company,* brought an action against the *Electric Company* and recovered judgment, and upon the trial of the action against the *Electric Company* the jury found that Muth, the driver of the coal wagon, was not guilty of any want of ordinary care on his part which contributed to the injuries that he, Muth, suffered. The *Fuel Company* moved to have the driver, Muth, made a party defendant pursuant to the provisions of secs. 2610, 2611, and 2656*a,* Stats. This motion was denied and the *Fuel Company* excepted. The trial was had and the jury found that the car of the *Electric Company* was not operated with ordinary care in that it was run at a high rate of speed; that the motorman failed to ring the gong, failed to keep a proper lookout, and did not exercise ordinary care after it became apparent that Muth would drive upon the track; that Muth did not look in the direction from which the car was approaching at the last opportunity before going upon the track; that Muth should have appreciated, in the exercise of ordinary care, that a collision would result unless the speed of the car was materially reduced, and that the negligence of Muth and the negligence of the motorman proximately caused plaintiff's injury. Upon the verdict judgment was rendered for the plaintiff. Both defendants appealed. However, on motion of its codefendant the appeal of the *Electric Company* was dismissed; so that the case is now before us upon the appeal of the *Fuel Company.*

For the appellant there was a brief by *Doe, Ballhorn & Doe,* and oral argument by *J. B. Doe.*

For the respondent *Ertel* there was a brief by *Lehr &*

Kiefer, attorneys, and *Julius E. Kiefer,* of counsel, and oral argument by *Julius E. Kiefer.*

For the respondent *Milwaukee Electric Railway & Light Company* there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* and oral argument by *W. T. Sullivan.*

ROSENBERRY, J. It is alleged that the trial court erred in the following particulars: (1) In denying the *Fuel Company's* motion to make Muth, the driver of the coal wagon, a party defendant in the action. (2) In denying appellant's motion to amend its answer so as to allege that the question of the negligence of the driver of appellant's coal wagon was *res adjudicata.* (3) In refusing to allow the appellant *Fuel Company* to show by the witness Muth that when he approached the tracks there was in his judgment plenty of time for him to cross in safety. (4) In refusing to allow the defendant *Fuel Company* to offer in evidence the verdict of the jury, order for judgment, and judgment in the case of Muth v. Milwaukee Electric Railway & Light Company. (5) In permitting counsel for the *Electric Company* to comment upon the fact that an insurance company was interested in the defense. (6) In denying the motion of the *Fuel Company,* after verdict, that the judgment contain a clause directing the execution to be first satisfied out of the property of the *Electric Company.*

Sec. 2610, Stats., is as follows:

"The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, or any persons not parties to the action have such interests in the subject matter of the controversy as require them to be made parties for their due protection, the court shall order them to be brought in; and when in an action for the recovery of real or personal property a person not a party to the action, but having an in-

terest in the subject thereof, makes application to the court to be made a party it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property or for the conversion thereof may, at any time before answer, upon affidavit that a person, not a party to the action and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in court the amount of the debt or delivering the property or its value to such person, as the court may direct; and the court may in its discretion make the order. A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order. This section shall be liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there be two controversies, provided the contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability or serious hardship."

The *Fuel Company,* upon the motion to join Muth as a party defendant, contended that the negligence with which it was chargeable, if any, was the negligence of its employee, Muth, that he would therefore be liable over to it, and that the *Fuel Company* was entitled to have him made a party so that all matters in controversy might be disposed of in one action.

The statute is by its terms permissive. The defendant who shows by affidavit *may,* upon due notice, have a third person made a party defendant, and the court *may* in its discretion make such order. We are of the opinion that the ap-

plication to have Muth made a party defendant was addressed to the sound discretion of the trial court and that the court properly exercised its discretion in this case.

The *Fuel Company* made a strong effort to have determined upon this trial the question of the liability of the *Fuel Company* and the *Electric Company* as between themselves. It must be conceded upon this record that both companies are liable to the plaintiff and that under well established principles of law he has a right to satisfy his claim out of either company. To direct an execution to issue against one or the other of the defendants would amount to depriving the plaintiff of this substantial right. Furthermore, the question as to whether or not either of the defendants is entitled to contribution from the other is a matter with which only the defendants themselves are concerned, and it cannot arise until one or the other has been compelled to bear more than its legal share of the burden. We make no intimation here as to the rights of the defendants against each other. The question may never arise, and until it does it cannot be determined or decided. Therefore we are of the opinion that the trial court was right in denying appellant's motion to amend its answer and in refusing to permit the *Fuel Company* to offer in evidence the verdict of the jury and judgment in the case of Muth v. Milwaukee Electric Railway & Light Company, and in denying the *Fuel Company's* motion after verdict.

Upon the trial the counsel for the *Fuel Company* asked the witness Muth the following question: "State, Mr. Muth, whether or not when you approached the tracks to drive across, and saw the car where you say you did, whether you thought you could pass over it safely or not?" Objection to this question was made and sustained, of which the *Fuel Company* complains.

We think it was clearly error not to permit the witness Muth to answer this question. *Tesch v. Milwaukee E. R. &*

L. Co. 108 Wis. 593, 84 N. W. 823; *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 119 N. W. 833. While it is error, we cannot upon the whole record say that it constitutes ground for reversal. The testimony of the witness Muth, taken as a whole, clearly indicates that he claimed he did see and observe the car and that he thought he could pass the tracks in safety, although he nowhere says so in that many words. However, he should have been permitted to testify to the facts as they appeared to him at the time and his conclusion therefrom as to whether or not he thought he could pass over the tracks in safety.

It appeared upon the trial that certain affidavits had been taken. A witness who made one of the affidavits was asked who took his affidavit, and in reply he said: "Insurance company and *Milwaukee Western Fuel Company.*" "*Q.* Insurance company of the *Milwaukee Western Fuel Company?* *A.* Yes, sir." Another witness testified that his affidavit was taken by one who told him he was representing the *Milwaukee Western Fuel Company* through their insurance company. The affidavits in question were introduced by the *Fuel Company,* and the fact that the *Fuel Company* was represented by an insurance company was commented upon by counsel for the *Electric Company* in his argument to the jury. The trial court, when the matter was called to its attention, during the argument of counsel for the *Electric Company* to the jury, said: "Gentlemen, you will be governed by your recollection of the evidence in this case in this respect and exclude from consideration anything that is not established by the evidence." At another time the court said: "I say to you, gentlemen, you will be governed by your recollection of the testimony." And at the request of counsel for the *Fuel Company* the court further instructed the jury: "At this time I will say to the jury an insurance company is not the defendant in this action. The defendants are the *Milwaukee Western Fuel Company* and the *Milwaukee Electric Railway & Light Company.*"

In this case the fact that the *Fuel Company* was represented by an insurance company was called out in connection with the affidavits offered by counsel for the *Fuel Company*, and in that respect it differs from *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049, and other cases cited to our attention. The remarks complained of could only have served to increase the amount of the verdict, which in this case was reduced by the trial court from $8,000 to $4,000, and upon the whole record we cannot say that there was material prejudicial error. While the admonition of the trial court might have been more vigorous and emphatic, we think the jury clearly understood that the remarks of counsel objected to were to be disregarded.

By the Court.—Judgment affirmed. Respondent *Ertel* to recover full costs against appellant. Respondent *Milwaukee Electric Railway & Light Company* to recover only costs for printing brief.

WILL OF BRANDON: HOFFMEISTER and others, Appellants, vs. AMBERG, Respondent.

November 14—December 5, 1916.

Limitation of actions: Pleading: Appeal: Review: Questions considered: Wills: Legacies, when payable: Interest: Delay in probating will.

1. In order that advantage may be taken of the bar of the statute of limitations it must be specially pleaded.
2. Questions not raised in the trial court will not ordinarily be considered on appeal to the supreme court.
3. Where, in place of a provision in a will giving testator's married daughter an equal share with his other daughters in the homestead, a codicil substituted a legacy of $200, to be paid to her by the other heirs "after my death," such legacy was intended to become due and payable one year after testator's death, that being the time generally limited for the payment of debts and legacies.

4. Where, in such case, the other daughters had come into the use and possession of the homestead immediately after testator's death, the married daughter was entitled to interest on her legacy from the time it became due, although by agreement among the heirs the will was not probated until many years after.
5. A will may be admitted to probate at any time after the death of the testator.

Appeal from a judgment of the circuit court for Vernon county: E. C. Higbee, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court reversing a judgment of the county court.

One Hugh Brandon of Vernon county died November 12, 1889, leaving a will dated February 26, 1886, and a codicil thereto dated July 23, 1887. The said will and codicil were duly admitted to probate in June, 1910. Surviving said Hugh Brandon were his widow, Mary Brandon, who died December 15, 1909, and the following named children: Mary, Anna, since deceased, *Eliza Amberg* (respondent), Agnes, William, and Frank.

By the will there was devised to the son Frank eighty acres of land, and the rest of his real estate, consisting of the homestead, to his wife, Mary, for life, and after her death to his four daughters in equal shares. To the son William was bequeathed the sum of $5, to a grandchild, Pearl, the second best cow, and the rest of his personal property to his three daughters, Mary, Anna, and Agnes. The material changes by the codicil read as follows:

"1st. It is my wish that my homestead consisting of [description], shall be the home of my daughters Mary, Annie, and Agnes and that they have the control of the same, and also that my wife shall make her home upon the same and to receive her support and clothing from the same during her life.

"2d. Instead of my daughter *Eliza,* wife of John Amberg, having an equal share of my homestead (after the death of my wife), I wish that my other heirs shall pay her after my death the sum of two hundred dollars, and that sum to constitute her entire share of my estate."

Shortly after the death of Hugh Brandon the heirs, knowing of the contents of the will and codicil, agreed that nothing should be done with reference to a settlement of the estate during the lifetime of the widow, but all joined in a quitclaim deed to Frank of the property devised to him and he went into possession.

At the time of the settlement of the final account of the administrator with the will annexed in April, 1911, it appeared that, although the administrator treated the homestead as being so much cash in his final account, as a matter of fact no sale of the homestead was made and no personal property came into his hands, except that the two surviving sisters of the three who received the homestead gave him the sum of $200 to satisfy this bequest to *Eliza Amberg,* the sisters having retained and still retaining the homestead. On the application for final settlement a contention was made by the administrator that the legacy to *Eliza Amberg* could be discharged by the payment of but the $200, with no allowance for interest thereon. *Eliza Amberg* duly objected to such construction and demanded payment of the legacy of $200 with interest at the legal rate from one year after the death of testator. The county court disallowed any claim for interest on said sum, from which ruling *Eliza Amberg* duly appealed to the circuit court.

In the circuit court issues were framed upon a complaint by *Eliza Amberg* setting forth her contentions; and an answer was interposed on behalf of these two surviving sisters, but no questions raised therein as now suggested, that this was a personal obligation of the sisters who took the homestead or that the statute of limitations applied.

Upon the hearing had it was stipulated, in addition to the facts above recited, that the widow, together with the three daughters, took possession of the farm and had the rents, issues, and profits thereof until after the death of the widow and also had possession of the personal property.

Upon his findings of fact the circuit court directed judg-

ment in effect construing the will so as to charge and burden the homestead devised to the three daughters with the payment of the sum of $200 and interest thereon from the period of one year after the death of the testator, from which judgment an appeal was taken to this court by the two surviving sisters who took the homestead, and the administrator.

For the appellants there was a brief by *C. J. Smith* and *E. J. Hammer,* and oral argument by *Mr. Smith.*

For the respondent there was a brief by *J. T. Dithmar* and *R. P. Clark,* and oral argument by *Mr. Dithmar.*

ESCHWEILER, J. The substantial question presented on this appeal is whether this bequest shall draw interest from the period of one year after the death of the testator, as claimed by *Mrs. Amberg,* or from the time at which the administrator could have been required by law to pay this legacy after the actual probating of the will, as claimed by appellants.

The appellants contend that this is a general legacy and does not take effect until after the will is probated, and then cannot be referred back as to the time of the death of the testator, and that the claimant *Eliza Amberg,* by joining in the agreement of the heirs to delay the probate of the father's estate until the death of the widow, waived any rights she might have had for interest during such delay. And further, that this bequest of $200 became the personal obligation of the sisters taking the homestead and that therefore the county court had no jurisdiction; and lastly, that if it became such personal obligation the statute of limitations had run against it.

As to the latter propositions they are disposed of by the rules that in order to take advantage of the bar of the statute of limitations such bar must be specially pleaded (*Roach v. Sanborn L. Co.* 135 Wis. 354, 359, 115 N. W. 1102), and that questions not brought up in the court below cannot be

entertained here (*Birdsall v. Fraenzel,* 154 Wis. 48, 53, 142 N. W. 274).

When the deceased said in his codicil that he wished his other heirs shall pay to *Eliza Amberg,* "after my death," the sum of $200, it must be construed to mean that the payment was intended by him to become due and payable at such time as is ordinarily the period after death that the law provides for such payment in the ordinary course of administration, namely, one year after such death.

Construing this codicil in the light of the situation disclosed here, namely, that the testator changed the interest of his daughter *Eliza* in the estate from an equal share with the sisters in the homestead to this legacy of $200, and that the sisters had the use and enjoyment of the homestead from immediately after testator's death to the present time, and thereby the use, so to speak, of the $200 remaining unpaid to *Eliza,* there is nothing to indicate an intention by testator to postpone *Eliza's* interest in the estate beyond the time when the sisters took their interest. These appellants taking the homestead fixed their own time for immediate enjoyment by their own acts and ought not now complain of being required to place *Eliza* in as nearly the same position as themselves as is now possible.

The delay in admitting the will to probate is immaterial; it may be admitted at any time after the death of the testator (*Hanley v. Kraftczyk,* 119 Wis. 352, 96 N. W. 820), and the delay is attributable as much to the appellants as to the respondent.

The general rule is that such legacy becomes due and payable at the end of the year following the death of the testator, which is the time generally limited for the payment of debts and legacies. *Evans v. Foster,* 80 Wis. 509, 515, 50 N. W. 410; *Matter of Frankenheimer,* 195 N. Y. 346, 353, 88 N. E. 374; *Kingsbury v. Bazeley,* 75 N. H. 13, 70 Atl. 916.

Such legatee is in the same position as a creditor and en-

titled to be awarded interest at the legal rate for such time as he is kept out of his payment. *Matter of Rutherfurd,* 196 N. Y. 311, 315, 89 N. E. 820.

Interest does not depend upon demand or default (*Ogden v. Pattee,* 149 Mass. 82, 84, 21 N. E. 227; *Daniels v. Benton,* 180 Mass. 559, 62 N. E. 960); and even if the delay is caused by the legatee contesting the will, it does not affect the paying of interest as of one year from the death of the testator. *Claflin v. Holmes,* 202 Mass. 157, 159, 88 N. E. 664.

The appellants cannot now be heard for the first time to challenge the jurisdiction of the county court, and whatever delay there may have been in the probate of the will it was by virtue of the agreement between the heirs and ought not to be taken advantage of by any of the parties to the agreement. The circuit court was therefore right in its conclusions.

By the Court.—Judgment of the circuit court affirmed.

DELLE, Respondent, vs. BOSS, Sheriff, Appellant.

November 14—December 5, 1916.

Judgment: Period of lien on real estate: Suspension of enforcement: Execution: Docket entries: Executors and administrators: Claims.

1. Unless an entry of the fact of suspension of the enforcement of a judgment is made on the docket as provided in sec. 2902, Stats., there is no interruption of the running of the ten-year period during which, under said section, the judgment is a lien on the debtor's real estate.
2. Under sec. 2978, Stats., the enforcement of a judgment by execution is suspended for one year after the death of the judgment debtor.
3. Except for the purpose of enforcing an existing lien on real or personal property, our statutes do not contemplate the issuance of an execution against the property of a deceased judgment debtor, but rather that the whole estate should pass to the ad-

ministrator or executor, not to be interfered with by the levy of executions except in case of a specific lien, but to be administered under the direction of the county court, upon proper presentation of claims to that court.

APPEAL from an order of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action in equity to restrain the defendant, as sheriff, from selling a half acre of land (of which the plaintiff has the record title) upon an execution against one Frank Delle, plaintiff's deceased husband, based upon a judgment against said Frank rendered and docketed December 27, 1904. Plaintiff acquired title October 5, 1911, by deed from one Frank Alvin Delle, to whom the plaintiff and her husband had conveyed in January, 1909. Frank Delle died intestate November 30, 1910. The plaintiff's claim was that under sec. 2902, Stats., said judgment ceased to be a lien on said real estate ten years after the rendition thereof, viz. December 27, 1914, and that the execution in question, not having been issued until July 23, 1915, could not be levied thereon. The complaint also asked that the land be declared free from the lien of said judgment.

The defendant by answer alleged that plaintiff was not the *bona fide* owner of the land and did not purchase it in good faith, but that the conveyances thereof to Frank Alvin Delle and from him to the plaintiff were both made in bad faith, without consideration, and with knowledge of the existence and lien of said judgment.

A general demurrer to this answer was sustained by the court and the defendant appeals.

The cause was submitted for the appellant on the brief of *Graves & Masters,* and for the respondent on that of *C. W. Graves.*

WINSLOW, C. J. In this case it is held:

1. Under the provisions of sec. 2902, Stats., a judgment ceases to be a lien upon the debtor's real estate ten years after

the rendition thereof *except* in cases where its enforcement is suspended by injunctional order or otherwise by law and the judgment creditor also causes to be entered on the judgment docket the fact of such suspension, in which case the time of such suspension after the entry is not to be reckoned as part of the ten years. If the entry be not made the running of the statute is not interrupted.

2. Under sec. 2978, Stats., the enforcement of the judgment in this case by execution was suspended for one year after the death of Frank Delle, but, no entry of the fact having been made, the running of the statute was not interrupted and the lien of the judgment had expired when the execution herein was issued.

3. Except for the purpose of enforcing an existing lien on real or personal property, our statutes do not contemplate the issuance of an execution against the property of a deceased judgment debtor, but rather that the whole estate should pass to the administrator or executor, not to be interfered with by the levy of executions except in case of a specific lien, but to be administered under the direction of the county court, upon proper presentation of claims to that court. Any other course would involve confusion, waste, and the jeopardizing of the interests of all concerned. Sec. 2978, Stats.; *Eaton v. Youngs,* 41 Wis. 507.

4. It follows that the execution in the present case was improperly issued and that the answer stated no defense.

By the Court.—Order affirmed.

CROSSMAN, Appellant, vs. GIBNEY, Respondent.

November 14—December 5, 1916.

Partnership: Dissolution by one partner in contravention of agreement: Right to continue business: Possession of land: Accounting: Ejectment.

A partnership pursuant to which defendant was to occupy and operate for three years a farm owned by plaintiff and they were to share profits and losses equally, was dissolved "in contravention of the agreement between the partners" (sub. (2), sec. 1724*m*—26, Stats. 1915) by a written notice given by plaintiff declaring such agreement terminated on a date named prior to the expiration of the three years; and, the defendant not having in any manner complied with sub. 2, sec. 1724*m*—33, Stats., so as to entitle him to continue the business, his right to the possession of the farm terminated on the date named, even though at that time there had been no accounting including his claim against plaintiff for damages on account of the dissolution.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Reversed.*

This is an action in ejectment brought by the plaintiff to oust the defendant from possession of certain farm lands.

The plaintiff owns a farm in Vernon county. On January 5, 1915, he entered into a partnership agreement in writing with the defendant by the terms of which the defendant was to occupy the farm and operate it to conduct the partnership business pursuant to this agreement. For this purpose the plaintiff was also to furnish the seed and a part of the stock and the defendant agreed to do the necessary work and to furnish a part of the stock. The agreement provides "that the losses and profits shall be equally borne by the parties," that they shall be deemed in possession of the crops as partners and entitled to the rights and subject, in respect to the business, to the liabilities of partners. The contract further provides that it shall continue for a term of three years from February 1, 1915, and that an accounting shall be made on

the 1st day of February of each year, and that defendant's occupancy of the farm shall be deemed the possession of both parties. It contains provisions relative to the payment of the expense of threshing and harvesting and as to the amount of land to be plowed, and others which need not be repeated here.

On December 31, 1915, plaintiff served on defendant a notice in writing terminating the agreement. The plaintiff's agent and the defendant on or about February 1, 1916, adjusted the claims of the parties and settled all of the accounts up to that day except the division of some young stock. On March 8, 1916, a formal demand in writing was served on the defendant by plaintiff requiring defendant to deliver the premises to plaintiff. The defendant refused to deliver the possession of the farm to plaintiff, and this action of ejectment was commenced soon thereafter.

The trial court held that the parties to the action were partners for the purposes of the business embraced in their written agreement, but the plaintiff was not entitled to prosecute this action in ejectment until an accounting and settlement of the partnership affairs had been had, including a determination of what damages defendant sustained as the result of plaintiff's breach of the partnership agreement, and hence awarded judgment dismissing plaintiff's complaint. From such judgment this appeal is taken.

For the appellant there was a brief by *Henry C. Rowan* and *Grotophorst & Thomas,* and oral argument by *H. H. Thomas.*

C. J. Smith, for the respondent.

Siebecker, J. There is no dispute regarding the facts as stated above, and the only inquiry is whether the plaintiff, under these facts and circumstances, is entitled to recover possession of his farm from the date the partnership agreement was terminated, February 1, 1916, by the written no-

tice of plaintiff of December 31, 1915. The rights of the parties are controlled by the law governing partnership affairs as declared in "The Uniform Partnership Act" (sec. 1724*m*—1 to sec. 1724*m*—38, Stats. 1915). Sub. (2), sec. 1724*m*—26, provides that a partnership dissolution is caused "In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, *by the express will of any partner at any time.*" The only fact in the case operating to show a dissolution of the partnership is the action of the plaintiff by his written notice of December 31, 1915, declaring the partnership agreement terminated as of February 1, 1916. This, under the circumstances, constituted a dissolution of the partnership by the plaintiff in contravention of the agreement. It is not seriously contested but that plaintiff could in law do this and thereby render himself liable for the damages he caused the defendant as the other member of the partnership. Under this state of affairs the partnership was terminated unless defendant, pursuant to the provision of sec. 1724*m*—33, continued the business in the same name upon the conditions prescribed therein by sub. 2, "when dissolution is caused in contravention of the partnership agreement. . . ." The condition prescribed by this statute to enable defendant to continue the business of the partnership for the specified term requires that he apply the partnership property to the payment of plaintiff's interest therein, less the amount of damages plaintiff's termination of the partnership caused defendant, or to secure by bond the payment of the value of plaintiff's interest, less the damages which plaintiff caused defendant by terminating the partnership agreement. There is no showing that defendant has done either of these things or in any manner complied with the law to entitle him to continue the partnership business after the termination of the agreement on February 1, 1916. It is manifest that the partnership is terminated and that the defendant has no right

to continue the partnership business. Under these circumstances he has no right to remain in possession of the farm under the partnership arrangements. The farm was at no time a partnership asset, and the right to occupy it for carrying on the partnership business ceased at the time the partnership was terminated, namely, February 1, 1916. Under this state of the case defendant had no legal right to withhold possession thereof from the plaintiff. It is no answer to say that because no partnership accounting has been had the plaintiff is not entitled to the possession of his farm. Defendant's right to the possession thereof ceased on February 1, 1916, unless he complied with sec. 1724*m*—33 for continuance of the business. This he has failed to do. His right to an accounting of the partnership affairs does not vest in him the right to continue in possession of the farm after the partnership ceased. The defendant's right to an accounting including his claim for damages against plaintiff for dissolution of the partnership in contravention of the agreement, and to have the partnership property applied in payment of his claim, including damages, does not include the right to occupy the farm under the terms of the partnership agreement. The necessary consequence is that defendant unlawfully withholds the farm from plaintiff, that plaintiff is entitled to the possession thereof, and hence he is entitled to judgment awarding him possession of the farm and his damages for the unlawful dispossession by the defendant.

By the Court.—The judgment appealed from is reversed, and the cause remanded with direction that judgment be awarded in plaintiff's favor as indicated in the foregoing opinion.

DUNNING, Appellant, vs. LEDERER, STRAUSS & CO., INC., Respondent.

November 14—December 5, 1916.

Master and servant: Contract of employment: By the week or season? Modification: Custom: Discharge for cause: Changing findings of jury.

1. **A contract whereby defendant employed plaintiff by the week, with a provision for a yearly employment in case her services proved satisfactory, is *held* to have been closed by correspondence between the parties, and a subsequent letter from defendant to plaintiff, referring to "your acceptance of our proposition to manage one of our departments for the coming season," did not modify the contract but referred merely to management under the contract, the term of service to commence at the beginning of the coming season.**
2. **The contract being express, the custom as to employment for the season was immaterial.**
3. **Findings by the jury that defendant was not in good faith dissatisfied with plaintiff's services and did not discharge her for that cause are *held*, upon the undisputed evidence, to have been properly changed by the trial court.**

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This action was brought to recover wages claimed to be due plaintiff upon a six-months term of employment. Before the expiration of the six months plaintiff was discharged and she claims that such discharge was wrongful and that she is entitled to recover $398, balance due for said term, less the amount which she was able to earn. The defense is that there was a weekly employment, and further that defendant had a right to discharge plaintiff at any time her services did not prove satisfactory. The jury returned the following verdict:

"(1) Was the defendant honestly and in good faith dissatisfied with the services of the plaintiff? *A.* No.

"(2) If you answer question number 1 'Yes,' then did the

defendant discharge the plaintiff because of such dissatisfaction? *A.* ——.

"(3) Has the term 'season' a definite, recognized meaning in the millinery trade as applied to a manager? *A.* Yes.

"(4) What length of time is understood to be meant by the term 'season' in the millinery business as applied to a manager? *A.* Six months."

Plaintiff moved for judgment on the verdict and defendant moved that the answers be changed. The court ordered that the answer to question number 1 be changed from "No" to "Yes," and question number 2 was answered by the court "Yes."

Judgment was rendered dismissing the plaintiff's complaint on the merits, with costs, from which this appeal was taken.

For the appellant there was a brief by *Baldwin & Bosshard,* and oral argument by *C. L. Baldwin.*

For the respondent there was a brief by *Lees & Bunge,* and oral argument by *George W. Bunge.*

KERWIN, J. The question involved upon this appeal turns upon the contract of employment made between the plaintiff and defendant. This contract was made by correspondence and the facts upon which it rests are embraced in five letters as follows:

"Des Moines, Iowa.
January 7, 1915.

"*Mrs. Nelle Dunning,*
"Kansas City, Kans.

"Dear Mrs. Dunning: In answer to your communication of the 4th we have decided to employ you to manage one of our departments at a salary of $25 per week.

"We shall want you to start work about February first, but at the present time it is uncertain as to just where we will place you. In all probability it will be La Crosse, Wisconsin, the position Mr. Benninger told you about when he talked with you in Kansas City.

"We shall be able to advise you definitely about this within

a few days. In the meantime, please forward your acceptance of our proposition.

"Awaiting your reply, we remain,

"Very truly yours,

"LS. MD. LEDERER, STRAUSS & CO., INC."

"*Lederer, Strauss & Co.* January 10, 1915.

"Gentlemen: I will accept your offer as manager of one of your departments at $25 per week. A year-round position with a four weeks' vacation summer and winter and of course my fare from K. C. Very truly,

"1615 Reynolds Ave., MRS. NELLE R. DUNNING.

"Kansas City, Kans.

"Will be glad to know where you intend to place me as soon as possible."

"*Mrs. Nelle Dunning,* Des Moines, Iowa.

"Kansas City, Kans.

"Dear Mrs. Dunning: Your communication of the 10th is at hand, and in reply beg to state that in the event your services prove satisfactory, you can expect steady employment by the year.

"As regards vacation, it is our custom to give our managers one week each season with pay. Should you desire a longer vacation, of course, this could be arranged, but it would have to be taken on your own time.

"Your railroad fare will be paid on all business trips.

"We trust that this arrangement will be satisfactory to you, and kindly ask you to advise us immediately if you will accept our proposition.

"Awaiting your reply, we remain,

"Very truly yours,

"LS. MD. LEDERER, STRAUSS & CO., INC."

"*Lederer, Strauss & Co.* Jan. 12, 1915.

"Gentlemen: Your letter of the 12th is at hand, and in reply will say that I accept your proposition, and hold myself in readiness to come when you send for me.

"However, I will be very glad to know as soon as possible where I am going, and when.

"Very truly, MRS. NELLE R. DUNNING.

"1615 Reynolds Ave.

"Kansas City, Kans."

"Des Moines, Iowa.
January 13, 1915.

"*Mrs. Nelle Dunning,*
"Kansas City, Kans.

"Dear Mrs. Dunning: We have your communication of the 12th and note your acceptance of our proposition to manage one of our departments for the coming season.

"We shall let you know as soon as possible where we shall place you.

Very truly yours,
LEDERER, STRAUSS & CO., INC."

"LS. MD.

It is obvious that the plaintiff's letter written on January 12th and referring to "letter of the 12th" is an error and should read "Your letter of the 11th," as it is plain this letter of January 12, 1915, was in reply to defendant's letter of January 11, 1915. We think this correspondence made a contract of employment by the week with a provision for a yearly employment in case plaintiff's services proved satisfactory. It is perfectly clear that plaintiff's letter of January 12th amounted to an acceptance of the proposition made in defendant's letter of January 11th, and the only question is whether the defendant's letter of January 13th, wherein it refers to management of "departments for the coming season," amounted to a contract with plaintiff for the season or for any time other than a weekly employment. The court is of opinion that plaintiff's letter of January 12th closed the contract, and that the reference in defendant's letter of January 13th to the "coming season" simply meant to manage the business under the contract, the term of service to commence at the beginning of the coming season. This is clear from the correspondence referred to as well as the defendant's evidence on the trial.

In reply to a question put by the court to the secretary of defendant as to what was meant in the letter where the words referred to were used, he testified that he simply meant that plaintiff should report at the opening of the coming season. Since the contract was closed by the plaintiff's letter of January 12th, we think it clear that the defendant's letter of January 13th did not modify it.

The only remaining question is whether the defendant acted in good faith in discharging plaintiff. Upon this question we think the evidence is undisputed, and that the court below was right in changing the answer of the jury to the first question from "No" to "Yes" and in answering the second question "Yes."

Something is said by counsel for appellant in regard to the custom of employment for the season, but there is no question of custom here. The contract was an express contract. *Francis H. Leggett & Co. v. West Salem C. Co.* 155 Wis. 462, 144 N. W. 969. It follows that the judgment of the court below is right and must be affirmed.

By the Court.—Judgment affirmed.

TOWN OF PELLA, Appellant, vs. TOWN OF LARABEE, Respondent.

November 15—December 5, 1916.

Highways and bridges: Maintenance: Division of town-line highway: Replacement of destroyed bridge.

In an order made under sec. 1273, Stats., by the supervisors of adjoining towns, dividing a town-line highway and assigning certain parts thereof to be maintained by each town, no mention having been made of a small bridge in one of the parts so assigned and no provision made for its joint maintenance, the town to which said part was assigned and which had maintained the bridge for sixteen years at its own expense was bound to replace the bridge after an unusual flood had destroyed it and widened the bed of the stream which it spanned.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

A. M. Andrews, for the appellant.

For the respondent there was a brief by *Curtis, Van Doren & Cole,* and oral argument by *Llewellyn Cole.*

ROSENBERRY, J. Plaintiff and defendant are two adjoining towns, and on July 24, 1897, at a joint meeting of their respective town boards, they entered into the following agreement which was signed by the supervisors of the respective towns:

"Commencing at the northwest corner of *Larabee* and southwest corner of *Pella*. Running thence east the first one hundred and twenty rods is for *Pella* to maintain. The second one hundred and twenty rods is for *Larabee* to maintain. The next one hundred and sixty rods for *Pella*. The next four hundred and forty rods for *Larabee*. The next two hundred rods for *Pella*. The next two hundred and forty rods is for *Larabee* to open and maintain. The next two hundred and forty rods is for *Larabee* to open and maintain. The next two hundred and forty rods is for *Pella* to open and maintain. The next two hundred and forty rods is for *Pella* to open and maintain. The next one hundred and sixty rods is for *Larabee* to maintain."

In the first section of the town-line highway assigned to *Pella* there was a small wooden bridge spanning a small stream known as Hyde's creek. For sixteen years the town of *Pella* maintained this bridge and repaired it at its own expense. In the summer of 1912 a considerable flood destroyed the bridge and widened the bed of the stream, and the construction of a new bridge was made necessary. The defendant town refused to join in the construction of a new bridge and the bridge was built by the plaintiff, and plaintiff now brings this action to compel the defendant town to pay one half of the cost of the new bridge. The question is whether or not plaintiff town is liable for the replacement of the bridge under the terms of the agreement of July 24, 1897. At the close of the trial the court directed a verdict for the defendant for the following reasons:

"This bridge was not mentioned in the order dividing the highway. It was not a costly structure, nor very much of a bridge either to build as it was built or to maintain as it was

built. From the time of the division of the highway in 1897 to 1912, when it was destroyed by a flood, whatever repairs were made upon this bridge, if any there were, were made and borne by the town of *Pella*. There are small bridges and culverts in other parts of the highway; but neither the particular bridge nor any bridges and culverts were mentioned at the time of the division. Swamps and hills were, however, considered, and the swamps divided as nearly equally between the towns as possible. Since the division each town has maintained the part of the highway allotted to it.

"The bridge as it was in 1897 must have been in the minds of the supervisors of the two towns when the highway was divided, though it was not mentioned. If it then had been deemed of importance enough to mention, the supervisors could have apportioned the expense of maintaining it, as was done in *Waupun v. Chester,* 61 Wis. 401, 21 N. W. 251. That the bridge was not then mentioned and no provision made for its joint maintenance, at least tends to warrant the conclusion that it was included in the first 120 rods of the highway which *Pella* was to maintain, because of the small cost of maintaining it."

The agreement between the towns was made pursuant to the provisions of sec. 1273, Stats., and the real question in the case is, Was plaintiff town required to maintain that part of the highway so assigned to it, including the bridge, at its own expense? If the plaintiff was required under the terms of the agreement to maintain the bridge under the conditions that existed at the time the contract was made, it is manifest that the change in the physical conditions due to an unusual flood cannot change the terms of the contract. We have carefully examined the record in this case and are of the opinion that the circuit judge was correct in the construction which he placed upon this agreement, for the reasons which he gave.

By the Court.—Judgment affirmed.

GAZETT, Respondent, vs. IOLA CO-OPERATIVE MERCANTILE COMPANY, imp., Appellant.

November 15—December 5, 1916.

Fraudulent conveyances: Sales of goods in bulk: Statutes: Validity: Garnishment.

1. The bulk sale law (secs. 2317*c* to 2317*f*, Stats.),—providing that, with certain exceptions, the sale of a stock of goods in bulk, otherwise than in the ordinary course of trade, shall be conclusively presumed to be fraudulent and void as against existing creditors of the seller, unless certain requirements for the information and protection of such creditors are complied with,—is a valid exercise of the police power and does not invade any constitutional guaranty.
2. A sale in bulk of a stock of goods without compliance with secs. 2317*c* to 2317*f*, Stats., being void, the buyer at such sale holds the goods or the proceeds thereof subject to be reached by garnishment.
3. Where, after such a sale by insolvents, they settled with many of their creditors for fifty cents on the dollar, and in an action by a creditor with whom no settlement was made it appeared that the buyer was chargeable as garnishee with an amount largely in excess of the total amount of claims unsatisfied, the plaintiff was entitled to have his claim paid in full.

[4. Whether under any circumstances there should be a *pro rata* distribution among the creditors of the amount with which the buyer at such a sale is chargeable, not decided.]

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of the plaintiff and against the garnishee defendant.

The action was begun in justice's court, and from judgments against all the defendants appeal was taken to the circuit court, and upon trial had by the court it was found in substance that on March 28, 1914, the principal defendants, Wipf and Torbenson, were insolvent, with liabilities of over $32,230 and with assets of about $14,200; that on said date the principal defendants sold to the garnishee defendant their

entire stock of merchandise and fixtures located at Iola, Waupaca county, Wisconsin, in bulk, and of the then value of $12,700, which sum the garnishee defendant paid without fraudulent intent on its part; that the proceeds of the sale, together with other assets of the defendants and some contributions from relatives, were used by the principal defendants in payment of the general creditors of the said defendants, and all but plaintiff and two others of such creditors were paid by voluntary composition fifty per cent. of the face of their claims in full settlement; that plaintiff and such two other creditors declined to accept such settlement; that the amount of such unsettled claims is less than $400, including the claim of plaintiff and one other assigned to him; that such sale in bulk was had without previously furnishing to the purchaser a verified list of the creditors and without either seller or buyer causing the creditors to be notified of said sale or of its terms and conditions prior to the transfer of the property on that date. The trial court held that upon the facts there was a violation of the so-called bulk sale law, and that by reason of such transfer in violation of the statute the garnishee defendant became liable to plaintiff for the full amount of his two claims.

For the appellant the cause was submitted on the brief of *H. J. Severson.*

Lynn D. Jaseph, attorney, and *S. Fred Wetzler,* of counsel, for the respondent.

ESCHWEILER, J. The garnishee defendant, appellant here, claims that this bulk sale law, being secs. 2317*c* to 2317*f*, Stats., inclusive, is unconstitutional; or secondly, that the word "void" as used in the statute should be construed as "voidable," and that where a sale is without fraudulent intent and for full consideration the statute does not apply; and thirdly, that if the law be held constitutional, then that such garnishee creditors should recover no more than the fifty per

centum of their claims, the same proportion that was paid the other creditors with whom the compromise was made that more than exhausted the assets of the principal defendant. These statutes in substance provide that the sale, transfer, or assignment of any stock of goods, wares, and merchandise or fixtures pertaining to the same, in bulk, otherwise than in the ordinary course of trade, shall be conclusively presumed to be fraudulent and void as against the then existing creditors of such seller, unless certain conditions are complied with by seller and buyer.

An inventory must be prepared by both showing the quantity and, as far as possible, with the exercise of reasonable diligence, the cost price of each article in such sale; the buyer must demand and the seller must furnish a written verified list of his creditors, their addresses, and the respective amounts due them, or, if there be no creditors, a sworn statement to that effect; the buyer before taking possession or paying the consideration must give notice of such proposed sale and of the price, terms, and conditions thereof to all the creditors named in the list furnished by the seller or of whom the buyer has knowledge.

The law expressly excepts from its operation sales by persons acting in fiduciary capacities, such as executors, public officers, etc.; sales upon *bona fide* foreclosure of a chattel mortgage, or to or by any person to whom any such property may in good faith be transferred or assigned in trust for the creditors of such assignor or transferor for the purpose of liquidating his debts.

The law also provides that if such seller, or any one in his behalf, shall wilfully or knowingly refuse to make or shall make or cause to be made materially false or incomplete answers to the inquiries of the purchaser, he shall be deemed guilty of a misdemeanor and may be punished by imprisonment not to exceed a year or a fine not to exceed $250.

This form of legislation, aimed to prevent sales by debtors of their entire stock in bulk to one person, whereby frauds

might be perpetrated against other creditors, seems to have been first adopted in Louisiana in 1896, and from 1900 on was enacted in various forms in rapid succession by a large number of the states.

Laws substantially like the one in question here have been declared constitutional and a valid exercise of the police power by the supreme court of the United States and in a large number of the states shown in the following cases: *Lemieux v. Young,* 211 U. S. 489, 29 Sup. Ct. 489, affirming *Young v. Lemieux,* 79 Conn. 434, 65 Atl. 436, 600; *Kidd, Dater & Price Co. v. Musselman G. Co.* 217 U. S. 461, 30 Sup. Ct. 606, affirming *Musselman G. Co. v. Kidd, Dater & Price Co.* 151 Mich. 478, 115 N. W. 409; *John P. Squire & Co. v. Tellier,* 185 Mass. 18, 69 N. E. 312; *Jaques & Tinsley Co. v. Carstarphen W. Co.* 131 Ga. 1, 62 S. E. 82 (construing a statute very similar to the one here); *Humphrey v. Coquillard W. Works,* 37 Okla. 714, 132 Pac. 899 (where it was made presumptive only of fraud); *Coach v. Gage,* 70 Oreg. 182, 138 Pac. 847; *Wheeler & M. M. Co. v. Moon,* 49 Mont. 307, 141 Pac. 665; *Boise Asso. v. Ellis,* 26 Idaho, 438, 144 Pac. 6; *McDaniels v. J. J. Connelly S. Co.* 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947; *Cantrell v. Ring,* 125 Tenn. 472, 145 S. W. 166; *Appel M. Co. v. Barker,* 92 Neb. 669, 138 N. W. 1133; *McGray v. Woodbury,* 110 Me. 163, 85 Atl. 491; *Kett v. Masker,* 86 N. J. Eq. 97, 90 Atl. 243.

The following courts have held to the contrary: *Wright v. Hart,* 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. N. S. 338; *Williams & Thomas Co. v. Preslo,* 84 Ohio St. 328, 95 N. E. 900; *Charles J. Off & Co. v. Morehead,* 235 Ill. 40, 85 N. E. 264; *Pogue v. Rowe,* 236 Ill. 157, 86 N. E. 207; *Block v. Schwartz,* 27 Utah, 387, 76 Pac. 22, 65 L. R. A. 308; *McKinster v. Sager,* 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273.

Probably the strongest attack made upon this form of legislation is by the New York court of appeals in *Wright v. Hart, supra,* but the views in the dissenting opinion by

VANN, J., meet with the approval of many of the cases first above quoted, and it is said in *People v. Luhrs,* 195 N. Y. 377, 89 N. E. 171, that this decision is impaired by the ruling in the United States supreme court in *Lemieux v. Young, supra.* In Ohio subsequent to the case of *Williams & Thomas Co. v. Preslo, supra,* both the constitution and the law were amended, and then the law was held constitutional in *Steele, Hopkins & Meredith Co. v. Miller,* 92 Ohio St. 115, 110 N. E. 648, L. R. A. 1916C, 1023.

In Indiana, when held unconstitutional in *McKinster v. Sager, supra,* it applied only to merchandise creditors and creditors who had loaned money for the purpose of buying merchandise, and after being amended so that it applied to all creditors, as does our law, it was upheld in *Hirth-Krause Co. v. Cohen,* 177 Ind. 1, 97 N. E. 1, reaffirmed in *Beard v. Indianapolis F. G. Co.* 180 Ind. 536, 103 N. E. 404.

In Illinois, after the two cases *supra,* the law was amended in 1913 to meet the objections suggested in those decisions, and then declared constitutional in *G. S. Johnson Co. v. Beloosky,* 263 Ill. 363, 105 N. E. 287, Ann. Cas. 1915C, 411. In New York the law was amended in 1914 and held constitutional, following the United States supreme court decisions, in *Apex L. Co. v. Litke,* 93 Misc. 353, 158 N. Y. Supp. 21, and unconstitutional in deference to *Wright v. Hart,* 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. N. S. 338, in *Klein v. Maravelas,* 94 Misc. 458, 159 N. Y. Supp. 554. So leaving apparently but Utah in absolute condemnation of such a law.

The law in question was before this court in *Fisher v. Herrmann,* 118 Wis. 424, 430, 95 N. W. 392, and as its validity was not questioned on the argument or presented in the briefs of counsel, no opinion was expressed on the question now before us.

We see no difficulty in holding that this law is a valid exercise of the police power vested in the legislature and that it is not an invasion of any constitutional guaranty. It does

not take away the right to contract, but restricts and limits the methods by which such right to contract in certain general cases must be carried out. It exempts from its provisions sales by persons in fiduciary capacities, the want of which exemption is one of the grounds relied upon in the Utah decision *supra*. It also excepts from its conditions sales or transfers made for the purpose of liquidating the debts of the assignor.

Its penalties are mild and visited on the seller alone, and not on the purchaser.

The seeming severity of the provision that a bulk sale without the conditions precedent specified in the statute is *conclusively* presumed to be fraudulent as against existing creditors, is the provision which raises the most serious question. But as is said in *Frisbie v. U. S.* 157 U. S. 160, 165, 15 Sup. Ct. 586:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy."

So here, where the law does not absolutely prevent such sales when out of the ordinary course of the business but only places restrictions upon them, the fact that they may seem cumbersome, harsh, and arbitrary to the honest debtor is a consideration for the legislature alone.

The attempted sale by the principal defendants to the garnishee defendant being void under the statute, such garnishee defendant must hold the goods or the proceeds thereof subject

to be reached by garnishment. And so it has been held by several of the courts. *Jaques & Tinsley Co. v. Carstarphen W. Co.* 131 Ga. 1, 62 S. E. 82; *Wheeler & M. M. Co. v. Moon,* 49 Mont. 307, 141 Pac. 665; *Appel M. Co. v. Barker,* 92 Neb. 669, 138 N. W. 1133; *Kohn v. Fishbach,* 36 Wash. 69, 78 Pac. 199.

It appearing from the facts in this case that the amount with which the garnishee defendant must stand charged is largely in excess of the two claims presented by plaintiff here, and largely in excess of the total amount of claims unsatisfied, it is not necessary to determine the other question raised by the appellant as to whether or not, under any circumstances, there should be a *pro rata* distribution among the creditors of such proceeds.

Under the facts in this case the plaintiff is entitled to have his judgment paid in full. *National G. Co. v. Plotler,* 167 Mich. 626, 133 N. W. 493.

By the Court.—Judgment affirmed.

KAMPS & SACKSTEDER DRUG COMPANY, Appellant, vs. UNITED DRUG COMPANY, Respondent.

November 15—December 5, 1916.

Contracts: Executory: Termination: Bankruptcy of one party.

1. Where one party to an executory contract repudiates it, or puts it out of his power to perform it, the other party may at his option treat it as terminated at once.
2. The involuntary bankruptcy of a party being the result of acts or omissions of the bankrupt and regarded in the law as the equivalent of a voluntary act disabling the bankrupt from performing his executory business contracts, the other party thereto may at once treat such contracts as terminated.
3. The fact that in such a case the other party to an executory contract shared in a dividend or joined in a composition proceed-

ing did not interfere with his right to treat the contract as terminated.

4. A notification in such case that the contract (which was one of agency) would not be revived or continued in force until the account of the agent was entirely adjusted, amounted to an unequivocal declaration that the contract was terminated.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action for damages for breach of a written contract to supply the plaintiff with proprietary remedies, toilet preparations, etc., known as the "Rexall" products. The refusal was admitted, and the court on the trial submitted to the jury a single question as to the amount of the damage sustained by the plaintiff, which question was answered by the jury, but the court afterwards granted defendant's motion for judgment on the uncontradicted evidence, and the plaintiff appeals.

The facts appearing without dispute were as follows: Plaintiff is a domestic corporation carrying on a retail drug business at Appleton. The defendant is a Massachusetts corporation doing business at Boston and making and vending large quantities of proprietary remedies, toilet preparations, and miscellaneous articles usually kept in drug stores, under the name "Rexall" products, which are extensively advertised and widely sold. The defendant will only allow one firm in each city to handle its output, such store being known as the "Rexall" store. In July, 1904, in consideration of the plaintiff's purchase of four shares of the preferred stock of the defendant at $50 each, the parties entered into a written contract by which it was agreed (1) that defendant appointed the plaintiff its agent at Appleton and agreed not to sell its products to any other dealer there so long as the plaintiff performed the terms of the agreement; (2) that the plaintiff would uphold the prices set by the defendant for the goods and not sell them to any one except at

full retail prices; (3) that the plaintiff would confine its sales to its own retail store and its own customers, and in case of violation of either the second or third provision would pay $100 liquidated damages for each violation; (4) that the agreement should remain in force as long as plaintiff continued to hold stock in the defendant corporation. There were certain other provisions of the contract which have no bearing on the present controversy and need not be stated. This contract was carried out by both parties until the year 1913. On July 28th of that year the plaintiff was adjudged a bankrupt on petition of four of its creditors (not including the defendant). It then owed the defendant $603.50 on open account. In September following plaintiff's creditors accepted a composition settlement of twenty-five cents on the dollar, and the bankruptcy proceedings were dismissed and the store reopened. The defendant received its share, viz. $150.88, upon this settlement. October 1st following the plaintiff ordered a quantity of "Rexall" goods, and the defendant declined to deliver them, stating in substance that it was a rule of the house, when a loss had been suffered on any account, the agency would not be reopened nor any shipments made until the account had been entirely adjusted.

Francis S. Bradford, for the appellant.

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan,* and oral argument by *John W. Gauerke.*

WINSLOW, C. J. In this case it is held:

1. Where one party to an executory contract repudiates it, or puts it out of his power to perform it, the other party may at his option treat it as terminated at once. *Merrick v. Northwestern Nat. L. Ins. Co.* 124 Wis. 221, 102 N. W. 593; *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920.

2. The involuntary bankruptcy of a party disables him from performing his executory business contracts and is regarded in the law as the equivalent of a voluntary act, inasmuch as it is the result of acts or omissions of the bankrupt himself; hence it follows that such contracts may at once be treated by the other party as terminated. *Central T. Co. v. Chicago A. Asso.* 240 U. S. 581, 36 Sup. Ct. 412.

3. Sharing in a dividend or joining in a composition proceeding does not interfere with this right.

4. In the present case it appears that the defendant at once notified the plaintiff that the agency would not be reopened except upon compliance with certain conditions and this amounts to an unequivocal declaration that the contract was terminated.

By the Court.—Judgment affirmed.

MALLETTE, Respondent, vs. SCHEERER and another, imp., Appellants.

November 15—December 5, 1916.

Divorce: Alimony: Judgment directing conveyance of land in another state: Enforcement in that state: Full faith and credit: Constitutional law: Fraudulent conveyances.

1. A judgment of an Illinois court having jurisdiction of the subject matter of a divorce action and of the parties, both of whom were domiciled in that state, granting a divorce to the plaintiff wife, awarding alimony to her, "to be satisfied by the defendant by conveying to" her certain real estate in Wisconsin which he owned when the action was commenced, and directing that in default thereof execution issue therefor, is entitled, under sec. 1, art. IV, Const. of U. S., to full faith and credit in Wisconsin.
2. Where in such a case the defendant husband, by evading the processes of the Illinois court, prevented that court from enforcing its judgment and compelling him to convey the Wisconsin land to the plaintiff, and had fraudulently conveyed it, while the di-

vorce action was pending, to other persons, the wife is entitled to relief in the Wisconsin courts by way of a judgment enforcing the obligations of the Illinois judgment and, as incidental thereto, setting aside the fraudulent conveyances and quieting the title in her.

3. No objection to the enforcement of such a divorce judgment in the courts of Wisconsin exists on the ground of conflict between the policy of this state and that of Illinois in respect to the power of the courts in such cases to determine and enforce a division and distribution of the husband's estate,—the policies of the two states being in accord on that subject.

APPEAL from an order of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

This action is brought to set aside, as null and void, certain conveyances of lands in Wisconsin, made to the defendants *Allyne V. Scheerer* and *Hugo Scheerer,* as fraudulent, and to require the defendant Willard E. Carpenter to convey said lands to the plaintiff in conformity to the directions contained in a certain judgment of a divorce action tried in the superior court of Cook county, Illinois.

Prior to the commencement of this present action *Mabel Mallette* commenced an action in the superior court of Cook county, Illinois, against Willard E. Carpenter, one of the defendants herein, for a divorce and for alimony. In that action the Illinois court entered a decree in favor of the plaintiff, *Mabel Mallette,* granting her an absolute divorce from her husband, the defendant Willard E. Carpenter, and awarding her alimony in the sum of $4,000. The decree provided "that the defendant, . . . pay to the complainant, . . . as permanent and in full settlement of alimony herein, the sum of four thousand dollars, to be satisfied by the defendant by conveying to the complainant the said real estate, . . . the said conveyance to be made on or before thirty days from the date hereof;" and in default thereof "that execution issue therefor." The lands referred to in the decree were owned by the defendant when the action was commenced and were situated in the state of Wisconsin.

The defendant Willard E. Carpenter did not convey the lands to the plaintiff as directed by the decree of the Illinois court, but he had theretofore conveyed them to *Allyne V. Scheerer* and *Hugo Scheerer* during the pendency of the divorce action on November 4, 1914, the decree being handed down on the 28th day of September, 1915. Shortly after the divorce was granted to plaintiff the defendant Carpenter married *Allyne V. Scheerer,* his present wife and codefendant in this action.

The plaintiff's amended complaint in the present action alleges the foregoing facts and prays for judgment that the conveyances from Willard E. Carpenter to *Allyne V. Scheerer* and *Hugo Scheerer* be adjudged null and void and that the said defendant Willard E. Carpenter be directed to convey the lands to this plaintiff and that the title be quieted and confirmed in her.

The defendant Willard E. Carpenter is in default and the defendants *Allyne V. Scheerer* and *Hugo Scheerer* demurred to the complaint in the present action. The court overruled the demurrer, and this is an appeal from such order.

For the appellants the cause was submitted on the brief of *Fulton, Garey & Deutschman* and *Bouck, Hilton, Kluwin & Dempsey,* of counsel.

For the respondent there was a brief by *Browne, Browne & Smith,* and oral argument by *L. D. Smith.*

SIEBECKER, J. This is an action to enforce a divorce judgment against Willard E. Carpenter awarded by the superior court of Cook county, Illinois, in a divorce action brought by the plaintiff against Carpenter. As appears by the foregoing statement, such court awarded judgment in plaintiff's favor dissolving the bonds of matrimony between her and Carpenter and awarding judgment in her favor and against him for the recovery of her property rights in Carpenter's estate. It appears that Carpenter defaulted in the

payment of such judgment of alimony and refused to convey to plaintiff his title to certain real estate he owned in Wisconsin in satisfaction of the judgment of alimony. The defendants *Allyne V. Scheerer* and *Hugo Scheerer* deny plaintiff's right to proceed in the courts of this state to enforce this judgment against Carpenter and to assail as fraudulent his conveyance to them of his title to such real estate. The superior court of Illinois obtained jurisdiction of his person and the subject matter in the divorce action by personal service on him of its process and by his appearance by attorney in the action. At the time plaintiff commenced the divorce action she and Carpenter were domiciled in Illinois. The facts and circumstances show that Carpenter was subjected to the jurisdiction of the Illinois court for the purpose of the divorce proceeding and that such court has jurisdiction in the matter to determine all the rights of the parties arising out of their marital relations, including plaintiff's property rights in Carpenter's estate, and to render judgment awarding her permanent alimony as a division and distribution of his estate between them. *Cole v. Cole,* 142 Ill. 19, 31 N. E. 109; *Kunze v. Kunze,* 94 Wis. 54, 68 N. W. 391. Under the law of Wisconsin the same relief is appropriate in divorce actions under sec. 2364, Stats., and the numerous adjudications of this court on the subject. This court has recognized the propriety of a foreign jurisdiction to determine and enforce a division and distribution of a husband's estate in divorce proceedings, including Wisconsin real estate, by exerting its powers *in personam* against the husband and thus requiring him to comply with the order and judgment of such court respecting such property beyond its jurisdiction. *Dickson v. Loehr,* 126 Wis. 641, 106 N. W. 793; *Zentzis v. Zentzis,* 163 Wis. 342, 158 N. W. 284; *Pennoyer v. Neff,* 95 U. S. 714; *Fall v. Eastin,* 215 U. S. 1, 30 Sup. Ct. 3.

It is alleged that the defendant Carpenter evaded the processes of the Illinois court and thus prevented such court

from compelling him to convey to plaintiff the title he held to the Wisconsin real estate and that he fraudulently conveyed it to *Allyne V.* and *Hugo Scheerer* to hinder and defraud the plaintiff of the fruits of the divorce decree, and she therefore invokes the jurisdiction of the courts of this state to enforce the decree of the Illinois court for alimony and to compel him to satisfy the same by conveying her the title of his Wisconsin real estate as directed by the Illinois court. This claim is grounded on the provisions of sec. 1, art. IV, of the federal constitution, which declares: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Under this constitutional provision judgments of a sister state are not executory and do not *per se* authorize their enforcement by the processes of the courts of another state; such judgments have not the force and effect of a domestic judgment. A party who has obtained a judgment against another in one state has the right to sue upon it in another state under this full faith and credit clause of the federal constitution, and when it is exhibited in the latter court as evidence it entitles the party suing thereon to a judgment in such court enforcing the obligations of the original judgment. The right to so enforce a judgment for a money demand is well established. Decrees awarding alimony to a wife in a divorce action in any state, wherein such court has jurisdiction of the parties and the subject matter of the action, will be carried into effect by the courts of the sister states. *Barber v. Barber,* 62 U. S. 582; *Sistare v. Sistare,* 218 U. S. 1, 30 Sup. Ct. 682; *Kunze v. Kunze,* 94 Wis. 54, 68 N. W. 391; *De Longe v. Fischback,* 153 Wis. 193, 140 N. W. 1125. It is obvious in the instant case that a resort to the usual enforcement of the Illinois decree for alimony by execution only will not give the plaintiff the full relief awarded her in the divorce judgment, which decreed that Carpenter convey to her the title of the real estate he owned in Wisconsin when the divorce proceedings were begun. As indicated above,

the policy of this state is in accord with that prevailing in Illinois respecting the power of the courts to award the wife relief in divorce judgments for the purpose of making a settlement of the property rights of the parties arising out of their marital relations by awarding a final division and distribution of the husband's estate. No objection therefore exists to the enforcement of this divorce judgment in the courts of this state on the ground of conflict between the policy of Illinois and Wisconsin on this subject. The federal supreme court in *Barber v. Barber, supra,* declared:

"The parties to a cause for divorce and for alimony are as much bound by a decree for both, which has been given by one of our state courts having jurisdiction of the subject matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state, to have there the same binding force that it has in the state in which it was originally given."

The *Barber* and other cases on the subject were re-examined by that court in *Sistare v. Sistare,* 218 U. S. 1, 30 Sup. Ct. 682, and the *Barber Case* was affirmed in all respects. In the *Sistare Case* the court, speaking of the right to the enforcement of a judgment of a sister state by another state, declared:

". . . that, as pointed out in *Lynde v. Lynde,* 181 U. S. 183, 187, 21 Sup. Ct. 555, although mere modes of execution provided by the laws of a state in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another state in which the judgment is sought to be enforced, nevertheless *if the judgment be an enforceable judgment in the state where rendered* the duty to give effect to it in another state clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both states."

The judgment exhibited by plaintiff directs Carpenter to convey the title to the Wisconsin real estate to satisfy the judgment for alimony awarded plaintiff. This method of satisfying such a judgment is recognized in this state. We are led to the conclusion that plaintiff is entitled to the relief in the courts of this state of enforcing the Illinois decree by the judgment of our courts. As a part of such relief she has the right to litigate the question of the alleged fraudulent conveyance by Carpenter to the *Scheerers* of his Wisconsin real estate. Relief against such alleged fraud is incidental to the mode of enforcing the judgment under the laws of this state. The trial court properly overruled the demurrer of the defendants.

By the Court.—The order appealed from is affirmed.

SEDGWICK, Respondent, vs. BLANCHARD, Executor, and others, Appellants.

November 16—December 5, 1916.

Pleading: Exhibit made part of complaint: Sufficiency: Contract for benefit of third person: Agreement to convey land: Enforcement.

1. Where a copy of a contract is annexed to a complaint which states that it is so annexed and is "made a part of this complaint," such contract is a part of the pleading and may properly be resorted to in determining its sufficiency.
2. When a person for a valuable consideration paid to him by another agrees to pay or cause to be paid a sum of money to a third person, a stranger to the transaction, the latter thereby becomes possessed of the absolute right to the benefit of the promise, and a right of action thereby accrues to him against the promisor.
3. The fact that the payment was to be in land and not in money does not affect the rule above stated.
4. Where, by a written contract between father and son, the father agreed, in consideration of future support, etc., to convey certain land to the son by deed to become effective at the father's death, and also to convey certain other land to a daughter who

was not a party to the contract, but after performance for some years by the son the father conveyed to him both tracts of land upon condition that he pay a certain sum of money to the daughter, the latter was entitled, after her father's death, to compel the son to convey to her the land which he secured through a breach of the original contract.

APPEAL from an order of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action to compel the conveyance of certain real estate to plaintiff. The complaint alleges in substance that plaintiff is the daughter of H. C. Blanchard, deceased; that *E. B. Blanchard,* her brother, is the executor of the last will of the deceased, and that they constitute the sole heirs at law of H. C. Blanchard. *Elizabeth Blanchard* is the wife of *E. B. Blanchard.* It further alleges that in 1903 H. C. Blanchard entered into a contract with *E. B. Blanchard,* wherein, in consideration of future support, care, medical attendance, and payment of funeral expenses, he agreed to deed to said *E. B. Blanchard* certain real estate of which he was then the owner, the deed to become effective upon the death of H. C. Blanchard, and also to turn over to him personal property therein described, and to deed to plaintiff a certain described piece of real estate which he then owned and to deliver possession of all the real estate to be deeded to both son and daughter to the son to be used during the lifetime of H. C. Blanchard; with other provisions not material to this case. The agreement also provided that any failure on the part of *E. B. Blanchard* to keep or perform any of the conditions of the contract should render the same null and void, and *E. B. Blanchard* should surrender possession of the premises to H. C. Blanchard and redeliver to him the remaining personal property. The complaint further alleges that *E. B. Blanchard* entered into possession of all the real estate and personal property and supported his father pursuant to the agreement until on or about the 10th day of March, 1911, when, in consideration of love and affection, one dollar, and

future support, care, and burial, H. C. Blanchard executed and delivered a deed of all the real estate heretofore mentioned to *E. B. Blanchard* upon the condition that the latter pay the sum of $1,000 to plaintiff within five years from the date of the deed; that *E. B. Blanchard* accepted said deed and placed it on record on March 25, 1915. It then alleges that H. C. Blanchard died testate on the 23d day of March, 1915, devising said real estate to *E. B. Blanchard* subject to the payment of $1,000 to plaintiff; that demand to convey has been made upon defendants and that they have refused to do so. The defendants *E. B. Blanchard* and *Elizabeth Blanchard* entered a general demurrer and there was a separate demurrer by *E. B. Blanchard* as executor. The court overruled the demurrers, and the defendants appealed.

For the appellants there was a brief by *Freeman & Freeman,* and oral argument by *Charles E. Freeman.*

For the respondent there was a brief by *J. R. Mathews* and *R. E. Bundy,* and oral argument by *Mr. Bundy* and *Mr. John E. Foley.*

VINJE, J. A copy of the contract entered into between *E. B. Blanchard* and H. C. Blanchard was marked Exhibit A and annexed to the complaint, which contained this allegation relative thereto: "a copy of which contract is hereto annexed, marked Exhibit A, and made a part of this complaint." We fail to appreciate the force of appellants' ten-page argument to the effect that the contract is not a part of the complaint and cannot be resorted to for the purpose of determining its sufficiency, nor can we see the relevancy of the cases cited to sustain the argument. The method here pursued of making the contract a part of the complaint has been too long recognized by this court to be now open to question or to need citation of authorities in its support.

The complaint alleges the execution of a written contract for a valuable consideration for the benefit of plaintiff, a stranger thereto; that the contract was performed for about

eight years, when the parties thereto sought to change it without the consent of the plaintiff; that demand for a conveyance has been made and refused. The facts alleged bring the case under the principle declared in *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, namely, that when a person for a consideration paid to him by another agrees to pay or cause to be paid a sum of money to a third person, a stranger to the transaction, the latter thereby becomes possessed of the absolute right to the benefit of the promise and a right of action thereby accrues to him against the promisor. This principle has since been recognized and applied in *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74; *Peterson v. C. & N. W. R. Co.* 119 Wis. 197, 96 N. W. 532; *Gilbert P. Co. v. Whiting P. Co.* 123 Wis. 472, 102 N. W. 20; *Smith v. Pfluger,* 126 Wis. 253, 105 N. W. 476; *Whiting v. Hoglund,* 127 Wis. 135, 106 N. W. 391; *U. S. G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238; *Mootz v. Petraschefski,* 137 Wis. 315, 118 N. W. 865; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102; *Zwietusch v. Becker,* 153 Wis. 213, 140 N. W. 1056; *Wetutzke v. Wetutzke,* 158 Wis. 305, 148 N. W. 1088; *Roundy, Peckham & Dexter Co. v. Baldwin,* 161 Wis. 342, 154 N. W. 364; *Concrete S. Co. v. Ill. S. Co.* 163 Wis. 41, 157 N. W. 543, and is now too firmly entrenched in the jurisprudence of the state to be successfully questioned. In *Gimbel Bros. v. McConnell,* 159 Wis. 325, 150 N. W. 495, the principle was recognized, but held not applicable since no valid contract was made. The fact that the payment was to be in land and not in money does not affect the rule.

Since the promisor is dead and the defendants now have title to the land, secured through a breach of the original contract, no reason is perceived why they should not be compelled to convey to plaintiff if the facts alleged in her complaint are established.

By the Court.—Order affirmed.

MOHA, Appellant, vs. HUDSON BOXING CLUB, Respondent.

November 16—December 5, 1916.

Contracts: Performance: Boxing contest: Foul blow.

One who contracted to box ten rounds under certain rules, but in the second round, in violation of those rules, struck a foul blow which disabled his opponent and thus made substantial performance of the contract impossible, cannot recover the contract price of his services, even though the violation of the rules was not deliberate.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Plaintiff is a professional boxer and sues the defendant to recover twenty-two and one-half per cent. of the gross receipts of a boxing contest held under the management of the club December 4, 1914, at Hudson, Wisconsin. The contract was in writing and provided in substance that the plaintiff should box Mike Gibbons of St. Paul ten rounds "to a no decision" at the defendant's boxing arena, receiving as consideration therefor twenty-two and one-half per cent. of the gross receipts together with certain transportation and hotel expenses, he to deposit with a named stakeholder $100 to guarantee that he would make the weight specified in the contract, which sum, in case of his failure to appear or enter the contest, was to belong to the defendant; that the revised Queensbury rules, as interpreted by the referee and in compliance with the laws of this state and the rules of the state athletic commission, should govern the contest; that the referee should be George Duffy of Milwaukee; that if the referee should decide at any time that the plaintiff did not enter the contest in good faith, or if he discover bad faith on the part of either of the contestants, he may stop the contest and the defendant should not pay to either contestant any part of their compensation, unless the referee believes that the other contestant was not a party to the fraud, in which case he may award to such inno-

cent party such sum as he deems just; that the referee's decision shall be final as to fouls and as to frauds, and as to the amount he may award in case of frauds.

It appeared on the trial that the contest began, and that during the second round the referee decided that the plaintiff had struck a foul blow, *i. e.* a blow below the belt, and stopped the contest. Neither side introduced in evidence the revised Queensbury rules, nor the rules of the state athletic commission, but the referee testified that the rules prohibit the striking of a foul blow and that he stopped the contest because the other man was disabled by the foul blow. There was some testimony by spectators to the effect that the referee decided that the plaintiff was disqualified for deliberate fouling, but the referee denied this, and the jury found in answer to the single question submitted to them that the referee did not decide and announce that the plaintiff was disqualified for a deliberate foul. The plaintiff attempted to prove by the referee that, in case a contest of this kind is stopped at any time, even as early as the second round, by one of the boxers being knocked out or being disabled by an accidental foul, it was customary among the boxing profession to consider it a contest notwithstanding that fact, but the testimony was not admitted. The trial court held that the plaintiff had failed to perform his contract and hence could not recover. From this judgment plaintiff appealed.

For the appellant there was a brief by *Hannan, Johnson & Goldschmidt,* and oral argument by *William F. Hannan.*

Spencer Haven, for the respondent.

WINSLOW, C. J. Plaintiff sues to recover the contract price of his professional services. In order to succeed he must show at least substantial performance of his contract. It is certain that there has been none here. He contracted to box ten rounds under certain rules. At the outset of the contest, in the middle of the second round, he violated one of

the rules and as a result thereof disabled his opponent and thus by his own act made substantial performance impossible. Whether this act was deliberate or not cuts no figure. It was an act which he had contracted not to do, and it prevented performance. *Jennings v. Lyons,* 39 Wis. 553. It does not seem necessary to consider other questions; the considerations suggested are decisive.

By the Court.—Judgment affirmed.

WINKE, Appellant, vs. OLSON and others, Respondents.

November 16—December 5, 1916.

Infants: Right to inherit from foster-parents: Contracts: Construction: Specific performance.

1. A contract under which it is claimed that a foster-child, not legally adopted, is entitled to the rights of an heir at law of the foster-parents should not be specifically enforced so as to give the child those rights unless, in its terms and meaning, such contract is so clearly established as to show, without room for fair doubt, that the parties to it intended the child to have the right of inheritance claimed.
2. Plaintiff's father, a widower, placed her in the care and keeping of one G. and his wife, pursuant to a written instrument by the terms of which they were to have her "forever and all her time and privileges," he promising on his part that they should "be the parents of said child," and they agreeing and binding themselves "to care for said child in a parental manner and to enjoy all of the privileges of a child as if born" to them, and "to do our utmost to care for her as if our own child." No promise was made therein to adopt the child, nor was any reference made to property rights. *Held,* that such instrument did not, either in itself or in the light of all the surrounding circumstances, contain a promise or clearly show an intention on the part of G. and his wife that the child should have the right to inherit their property.
3. The word "privileges," as used in said instrument, does not necessarily include the right of inheritance.

APPEAL from a judgment of the circuit court for Pierce county: JAMES WICKHAM, Judge. *Affirmed.*

Equitable action to recover the value of property, which plaintiff claims she became entitled to, under a contract whereby she was placed by her father with John Gilbert and his wife to be dealt with as their child. The issues presented for trial by the pleadings, and in respect to which evidence was produced, were passed upon by the circuit judge, as indicated by the findings upon which the judgment was rendered, which findings, so far as they need to be examined, are as follows:

1. Plaintiff, who was born April 28, 1878, is the daughter of Aliot and Maria Torgerson. The mother died August 17, 1880. The father was then in such poor circumstances that he placed his six children in the care of other persons.

2. John O. Gilbert and Maria, his wife, at the time last mentioned, were childless and lived on a farm near the Torgerson home. At their request, November 25, 1881, Mr. Torgerson placed plaintiff in the care of the Gilberts under a written instrument of which the following is a copy:

"This indenture, made and entered into this 25th day of November, A. D. 1881, by and between Aliot Torgerson, a widower residing in the town of Gilman, in the county of Pierce and state of Wisconsin, party of the first part, and John O. Gilbert and Maria O. Gilbert, wife of said John O. Gilbert, of the town of Martell, in county and state first aforesaid, party of the second part,

"Witnesseth, that the said party of the first part for a valuable consideration doth by these presents hereby let and surrender forever to the said parties of the second part my daughter, Mathilda Torgerson, being the youngest daughter and legitimate daughter with my wife, now deceased, known as Maria Torgerson, to have my said daughter Mathilda forever and all her time and privileges; which my said daughter was born on the 28th day of April, A. D. 1878, by my said wife, Maria Torgerson, during her and my marriage, and I do by these presents hereby relinquish all my right, title,

and interest to her my said daughter forever. And I further promise and agree that said parties of the second part shall after the date hereof be the parents of said child and be under their exclusive control forever and forever. And the said parties of the second part for themselves agree and bind themselves to care for said child in a parental manner and to enjoy all of the privileges of a child as if born by said party of the second part and will do our utmost to care for her as if our own child.

"In witness whereof the said parties hereto have hereunto set their hand and seal this day and year first above written.

"ALIOT TORGERSON. (Seal.)

"Signed and sealed in presence of

"B. M. Anderson.

"Peter R. Albertson."

"State of Wisconsin, St. Croix County—ss.

"Be it remembered that on this 25th day of November, A. D. 1881, personally came before me the above named Aliot Torgerson, of the town of Gilman in the county of Pierce and state of Wisconsin, to me known, and known to me to be the person who executed the within instrument, and acknowledged the execution thereof to be his free act and deed for the uses and purposes therein mentioned.

"B. M. ANDERSON,

"(Notarial Seal.) Notary Public, St. Croix, Wisconsin."

Thereafter the Gilberts treated plaintiff in all respects as their child while she remained with them. She believed they were her parents until she was ten years of age, when she learned who her parents were. She was known as Matilda Gilbert, and was confirmed in the church which the Gilberts attended as Matilda Torgerson Gilbert.

4. At the age of nineteen plaintiff left her home without the knowledge or consent of the Gilberts; but was induced to return the next day by Mrs. Gilbert. After about one year she again left her home as before and did not return until the death of Mr. Gilbert; though in 1900, at his request and expense, she attended school in Minnesota for three months. Thereafter, until Mr. Gilbert died, he and his wife corresponded with plaintiff in a friendly way, some-

times urging her to return home. After her marriage in 1902 they requested her and her husband to visit them. They often sent her presents of money and other things.

5. Mr. Gilbert died intestate January 13, 1909. His estate was probated in due course in the county court of Pierce county, Wisconsin,—such proceedings being duly had that February 8, 1910, the net estate consisting of $25 in money and some real estate situated in Milwaukee county, Wisconsin, were, in due form, assigned to Mrs. Gilbert as his only heir.

6. The Gilbert farm consisted of eighty acres of land in Pierce county, Wisconsin. The two were joint owners thereof from the time they acquired the property until September 18, 1889, when Mr. Gilbert conveyed his interest to Mrs. Gilbert. June 29, 1898, thereafter, they both joined in conveying the land to *Caspar Olson*. December 5th, thereafter, the land was duly conveyed by *Mr. Olson* and his wife to Mrs. Gilbert by quitclaim deed expressing one dollar as the consideration.

7. Mrs. Gilbert died intestate April 24, 1914. She was in poor health for some years theretofore. On that account, and particularly on account of her mental condition in February, 1909, she was placed under guardianship. Thereafter her real estate was duly converted into money. Substantially all property in possession of the administrator of her estate is a portion of the proceeds of the sale of the farm and no part, so far as appears, is proceeds of property she obtained from Mr. Gilbert's estate.

8. The defendants other than the administrator are the heirs at law of Mrs. Gilbert.

9. Prior to Mrs. Gilbert's death, plaintiff visited in the vicinity of her home but did not visit them. After Mr. Gilbert died she visited Mrs. Gilbert, and thereafter did so on three occasions in the course of three weeks, when Mrs. Gilbert was in a sanatorium at Hudson, Wisconsin, but did not correspond with her or with her guardian, or care for her.

On such facts the court concluded that plaintiff was not entitled to any relief under the contract as regards the property left by Mrs. Gilbert and dismissed the action with costs.

W. G. Haddow, attorney, and *Spencer Haven,* of counsel, for the appellant.

John E. Foley, for the respondents.

MARSHALL, J. In a case of this kind, specific performance should not be decreed unless the contract, in its terms and meaning, is clearly established so as to show, without room for fair doubt, that the parties to it intended the child to have the right of heirship the same as if born to those taking it into their family. No such right should be held to have been intended by a contract which is so ambiguous that a different meaning could be reasonably read out of it. *Dilger v. Estate of McQuade,* 158 Wis. 328, 148 N. W. 1085; *Heath v. Cuppel,* 163 Wis. 62, 157 N. W. 527. A large number of authorities on the subject, in general, will be found referred to in the report of *Heath v. Cuppel.* The court there remarked that "In such cases the facts must not only be consistent with performance of such a contract, but must also be such that they cannot reasonably be harmonized with any other theory." In *Kinney v. Murray,* 170 Mo. 674, 701, 71 S. W. 797, the supreme court of Missouri, speaking on the same subject, said:

"When, as in this case, and in consonance with this doctrine, a court of equity is called upon to establish and enforce a contract of this character, in the teeth of the statute of wills, and of the statute of frauds and perjuries, and to set aside the disposition of valuable property made in conformity with the requirements of those statutes, there is devolved upon the chancellor the gravest responsibility, perhaps, that ever attaches to his high office. And nothing short of the inherent justice of the claim, supported by evidence that can be relied upon with the utmost confidence, proving the ex-

istence of the contract, its terms and conditions and a substantial and meritorious compliance therewith, with such certainty and definiteness as to leave no room for reasonable doubt, can ever justify the exercise of such an extraordinary prerogative."

The rule referred to is very important here, as it seems quite certain the decision below was grounded on a conviction that it does not clearly appear that the agreement provided plaintiff should have the right of inheritance as to the property of the Gilberts. Unless that view is clearly wrong, the judgment must be affirmed.

The language of the writing is quite ambiguous, tested by the degree of clearness above indicated. Therefore we may look to such language and also to the circumstances characterizing the making of the agreement and apply such rules of construction as will aid in determining what the parties intended. The intention so indicated will control in the construction of the writing regardless of expressions which might, under some circumstances, convey a different meaning. That is a very familiar doctrine,—one which courts apply so often that it is quite elementary.

Following the words of agreement on the part of appellant's father, by which "all her time and privileges" were pledged to the Gilberts, and it was promised that she should be "their child and they her parents," are these words, indicating the scope of their obligations: "And said parties of the second part, for themselves, agree and bind themselves to care for said child in a parental manner and to enjoy all of the privileges of a child as if born by said party of the second part and will do our utmost to care for her as if our own child."

What does the word "privileges" mean? It is significant that the promise was not, expressly, that the child should have "all of the privileges of a child" of the Gilberts. If such words were used to express a condition of the agreement on their part, that they should enjoy all of the "privileges"

of a child born to them, in return for the care agreed to be afforded, that would be consistent with the language in the first part of the agreement that they should "have all the time and privileges of a child" born to them. In that view it would be a reasonable reading of the contract that the Gilberts agreed, in consideration of having the child in their family and the benefit of her society and services, to give her the same care as if born to them, and that it did not contemplate making any property provision for her or adopting her with the incidental right of heirship. If the word "privileges," when used the second time, should be regarded as having been employed to bind the Gilberts to accord to the child all the privileges of one born to them, and it is considered that it was so used, the meaning is still quite involved in obscurity. The word was used in such close connection with the pledge "to care for said child in a parental manner" and to care for her "as if our own child," as to seem to make the latter explanatory of the former. Full effect could be given to the language without holding that it was intended to include the right of inheritance.

True, as counsel for appellant contend, the words "care for her as their own child" and to enjoy all of the privileges of a child born to "the said party of the second part" were used with the intention of creating some obligation or duty on the part of the Gilberts; but whether such duty or obligation was intended to extend further than the care of the child in a parental manner is by no means certain. The word "privileges" was not a very apt word to use for the purpose of conferring the right of heirship. That is a real, a legal right, regulated by law, to be enjoyed subject to the conditions prescribed by statute. It is not a mere privilege. Counsel are in error in the claim that such word, as used, necessarily includes the right of inheritance. When we appreciate the care which persons ordinarily exercise in respect to disposing of their property, either in their lifetime or upon their de-

cease, some more definite language would seem to be required to accomplish it than such as could be well satisfied without including property advantages.

Turning to some of the most significant of the authorities relied upon by appellant's counsel, it seems that they are quite distinguishable from this case. In *Middleworth v. Ordway,* 191 N. Y. 404, 84 N. E. 291, the contract provided that the child should be entitled to "her dower right in the property of said first parties, the same as though she was their own legitimate offspring." The words "dower right" necessarily, as the court considered, referred to a right of some sort in property.

In *Martin v. Long,* 53 Neb. 694, 74 N. W. 43, there were articles of adoption providing, among other things, that the child should have $500 and "equal rights and privileges of children born in lawful wedlock." Those words, under the circumstances, were held to include the right of inheritance. The case hardly supports the idea that "privileges" in such a case would include, even under similar circumstances, the right of inheritance. But it should be noted that the words "rights and privileges" were not used with the explanatory feature we have here, suggesting that "privileges" pointed to the customary care which parents bestow upon their children as regards sustenance, home advantages, clothing, education, etc.

In *Crawford v. Wilson,* 139 Ga. 654, 78 S. E. 30, it was use of words, by the person taking the child, promising to "keep her as her own child and to adopt her as such, with all the rights of a child related to her as such by blood" which inclined the court to hold that the right of inheritance was promised. Here again we have the significant word "rights" and the absence of any explanatory feature.

In *Chehak v. Battles,* 133 Iowa, 107, 110 N. W. 330, the contract provided, expressly, for all the rights of an own child, including the right of inheritance.

In *Van Tine v. Van Tine* (N. J. Ch.) 15 Atl. 249, 1 L. R. A. 155, the contract expressly provided for property rights as was the case in *Peterson v. Bauer,* 83 Neb. 405, 119 N. W. 764; *Kofka v. Rosicky,* 41 Neb. 328, 59 N. W. 788; *Hespin v. Wendeln,* 85 Neb. 172, 122 N. W. 852; *Steele v. Steele,* 161 Mo. 566, 61 S. W. 815; *Winne v. Winne,* 166 N. Y. 263, 59 N. E. 832, and the cases in general where the subject was treated.

The case before us does not clearly satisfy the logic of any of the authorities cited to our attention, in favor of appellant, though it must be conceded that there is some language used, here and there, which might, under some circumstances, support a contrary view.

Turning to the situation the parties to the writing dealt with, we see much to suggest that the Gilberts did not intend to bind themselves to accord appellant the right of inheritance. She was, practically, a stranger to them,—not a relative, as was the case in many of the instances found in the books. There was nothing to move them, in advance of knowing how she would develop and treat them in the family relation, to promise that she should be their heir. That they, under the circumstances, should leave that to be determined in the future, promising only to give her the care which they would bestow upon an own child, was most natural. Ordinary prudence would have suggested that. Consistent therewith, they did not promise to adopt her. They did not refer to the subject of property, expressly, or by necessary inference. They did not use any such words as are commonly employed where the purpose is to promise property advantages. Mr. Gilbert appears to have been quite an intelligent man. He was an insurance agent as well as a prosperous farmer, and had, evidently, done considerable business. He, doubtless, knew what the legal adoption of a child meant, and that the written law provided therefor. The statutory method of adoption was not used, neither was the word "adop-

tion" or any equivalent word employed. In lieu thereof, the words were used promising care in a parental manner and to enjoy the privileges of a child of their own, which, as we have said, could be satisfied without affording property rights. It is quite significant that appellant was not regularly adopted. Such a circumstance has been regarded with such significance in some jurisdictions that it has been held that the right of heirship cannot be conferred by a person upon the child of another except in the manner provided in the written law where there is, as here, such law. *Renz v. Drury,* 57 Kan. 84, 45 Pac. 71; *Shearer v. Weaver,* 56 Iowa, 578, 584, 9 N. W. 907; *Willoughby v. Motley,* 83 Ky. 297.

The circumstances of appellant's father were such that it was as much a favor to him for the Gilberts to take his child as it was to them to secure her presence in their family, leaving property matters out of view. Their act was, practically, that of taking a dependent. If property rights had been in contemplation, it would have been most natural for the Gilberts to have protected their interests, after appellant left them, by mutual wills, and by such means to have remembered some, at least, of their numerous relations. That they did not, suggests that they had no thought that their property would go to appellant in the absence of a will. That is in harmony with Mr. Gilbert's statement, testified to on the trial, that it was too bad appellant did not remain with them as she could have had the whole thing.

The circumstances referred to, and others, doubtless, aided the court below in construing the agreement as not including a promise that appellant should have the status of a child of the Gilberts, as regards the right of inheritance. Other courts have been likewise moved, as indicated, by authorities cited to our attention, particularly *Baumann v. Kusian.* 164 Cal. 582, 129 Pac. 986. There the child was taken in a charitable way under a promise that it should be treated in all

respects as the child of the takers, and it was held that the agreement did not impose any obligation to leave property to it. We will not extend this opinion further by referring to authorities. There are many which might be cited, but none we have examined satisfy us that the trial court was clearly wrong in deciding that the parties to the writing did not intend appellant to have the status of a child of the Gilberts as regards the right of inheritance; that the privileges which were promised extend further than care, home advantages, clothing, sustenance, education, parental regard, and the like.

We do not overlook the evidence that Mr. Gilbert and Mrs. Gilbert, as well, on some occasions, casually remarked that they intended appellant to have property advantages by reason of her being in their family. That kind of evidence of sayings many years after they are claimed to have occurred, and under the circumstances characterizing them, in this case, is not very satisfactory. The Gilberts may have thought to leave property to appellant. That they did not suppose the writing, by itself, would accomplish it, is indicated by the remark of Mr. Gilbert before alluded to, and other circumstances. On the whole case it is considered that the decision of the trial court that the writing does not show with sufficient clearness that property advantages were promised appellant to justify specific performance, should be approved.

By the Court.—The judgment is affirmed.

UNION INVESTMENT COMPANY, Appellant, vs. EPLEY, Respondent.

November 16—December 5, 1916.

Bills and notes: Conditional delivery: Right to have note returned: Holder in due course: Bank chargeable with knowledge which its cashier has: Pleading: Variance: Evidence.

1. In an action upon a promissory note the answer is *held* not to admit that the note was given in consummation of a completed purchase by defendant of certain corporate stock, but in effect to allege a conditional delivery of the note under an arrangement by which it was to be returned to him if he decided not to buy the stock; and there was no fatal variance between such answer and defendant's testimony although the latter showed that the agreement actually made was expressed in different words than those alleged.
2. A finding by the trial court in such action that the note in suit, together with a stock certificate issued in defendant's name and assigned by him in blank, was left with the cashier of the bank to which the note was payable (who was also the president of the corporation issuing said stock) to be held by him until defendant decided whether or not he would purchase the stock, and that the note was to be returned to defendant if he decided not to make the purchase, is *held* to be sustained by the evidence.
3. Under the circumstances stated the note did not become a complete contract *in præsenti*, and defendant was entitled to its return upon notifying said cashier of his election not to purchase the stock.
4. The payee bank, in such case, was chargeable with the knowledge which its cashier had of the incomplete and revocable character of the note, and the delivery of the note by the cashier to the bank, which thereupon credited it to the corporation whose stock was involved in the transaction, did not render the bank a holder in due course.

APPEAL from a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

This is an action to recover $500 with interest at seven per cent. on a promissory note given by the defendant and

made payable to the People's State Bank, dated February 16, 1906. On October 4, 1908, after the note was due, the bank transferred it to the plaintiff.

It appears that one C. N. Gorham was the cashier and one of the general managing officers of the People's State Bank of Hudson, Wisconsin, and was vested with the usual authority of such a bank officer for the conduct of the banking business. During the time here in question he was also president of the Wisconsin Blue Grass Land Company, a corporation, and as such officer had general charge and management of the business of the corporation. In February, 1906, Gorham entered into a verbal agreement with the defendant whereby the defendant was to sign a promissory note for $500 drawn payable to this bank, for which he was to receive certificates of stock in the Wisconsin Blue Grass Land Company of the value of $500; defendant was to make an assignment in blank of these certificates, and both the note and certificates of stock so signed were to be held by Gorham until the defendant should notify him as to whether or not he (defendant) wanted to purchase such stock, and that if defendant decided to purchase such stock the note was to become binding and valid; but if the defendant should decide not to purchase the stock the note was to be returned to him at his request and be of no force. In accordance with this agreement the defendant signed both the note and the blank assignment of the certificates of stock and left them in the possession of Gorham. On the same or the following day Gorham deposited the note with the bank, and the bank under his directions credited the land company with the value of the note.

In the following April, 1906, the defendant, pursuant to the verbal agreement with Gorham, notified Gorham that he had decided not to purchase the stock in the land company and demanded return of the note. The note was never returned to the defendant and the certificates of stock were not

delivered to the defendant at any time. On the 25th day of February, 1910, the plaintiff commenced this action on the note. In the year 1909 the Wisconsin Blue Grass Land Company went into the hands of a receiver and the People's State Bank of Hudson, Wisconsin, discontinued business.

The circuit court found in favor of the defendant, and judgment was entered dismissing the complaint and that the defendant recover his costs and disbursements of the action. From such judgment this appeal is taken.

Spencer Haven, for the appellant.

For the respondent there was a brief by *McNally & Doar,* and oral argument by *W. F. McNally.*

SIEBECKER, J. It is contended by plaintiff that the court erred in admitting evidence, under the issues raised by the pleading, to the effect that the defendant and Gorham had agreed upon a conditional delivery of the note and the blank assignment of the stock. This claim rests upon the ground that defendant by his answer has admitted the making and delivery of the note and blank assignment of stock in consummation of a complete sale of the stock to defendant. The allegations of the answer deny specifically that defendant was indebted to the People's State Bank as alleged in the complaint charging that defendant on February 16, 1906, became indebted to the bank on the note in question for money loaned by it to him. The answer further alleges that Gorham on this day called at defendant's place of business and solicited the defendant to purchase stock of the Blue Grass Land Company; that defendant declined to purchase such stock, whereupon Gorham "offered to take a note for said sum of $500, payable to said People's State Bank, due in one year from date, *and that if at any time said defendant was not ready or inclined to pay for said stock, that the said People's State Bank would take said stock and return and*

cancel defendant's note, and under these circumstances and pursuant to this agreement said defendant did sign and put into the possession of said C. N. Gorham a writing in the form of a promissory note for $500 running one year from February 16, 1906, . . ."

It is manifest that these allegations do not allege that defendant purchased the stock nor do they necessarily import that the note was given in consummation of a completed purchase and sale of the stock; but the idea conveyed by the language of the allegations is that defendant was to have the right to buy or not to buy the stock, which necessarily implies that there was no consummated sale of the stock. We consider that the trial court, under the facts alleged in the answer, properly received the evidence disclosing the transaction actually entered into by the parties, and that there is no fatal variance between the allegations of the answer and the evidence of defendant on the subject. It is obvious that the pleader did not set out the exact words of the alleged agreement, and the evidence shows the agreement actually made was expressed in different words than those alleged. Under these conditions there is no case of real variance presented.

The plaintiff also assails the court's finding to the effect that the note and blank assignment were held by Gorham upon the agreed condition that he was to hold them until the defendant decided whether or not he would purchase the stock. We think the evidence sufficiently clear to support the trial court's finding of fact on this issue. The record sustains the conclusion that Gorham and defendant agreed that defendant should sign the note and blank assignment of stock, that they were both to be held by Gorham until defendant notified him whether or not defendant decided to purchase the stock, and if defendant decided to purchase the stock then the note was to be delivered in consummation of the stock purchase, otherwise the note was to be canceled and

returned to defendant. Under these circumstances the note did not become a complete contract *in præsenti*. The defendant, having notified Gorham of his election not to purchase the stock, was entitled to the return of the note. Such a note has no validity between the original parties until the conditions upon which manual tradition thereof was made have been satisfied. *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192; *Paulson v. Boyd,* 137 Wis. 241, 118 N. W. 841; sec. 1675—16, Stats. 1915.

It is urged that the People's State Bank was a holder of the note in due course. Sec. 1676—22, Stats. 1915 (Negotiable Instrument Law), defines who is a holder in due course. One of the incidents to constitute the holder of a note one in due course is "That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Sec. 1675—16, Stats. 1915, provides: "Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, . . . delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument." We are satisfied that Gorham had possession of the note knowing that it was incomplete and revocable until its delivery when defendant elected to purchase the stock. Under these circumstances it was his duty to communicate this information to the bank, and the bank is chargeable with the knowledge of Gorham as its active officer pertaining to the transaction whereby it became the holder of this note. 7 Corp. Jur. p. 530, Banks and Banking; *Paulson v. Boyd,* 137 Wis. 241, 118 N. W. 841; *First Nat. Bank v. Burns,* 88 Ohio St. 434, 103 N. E. 93, 49 L. R. A. N. S. 764, note; *Central B. & T. Co. v. Ford* (Tex. Civ. App.) 152 S. W. 700; *Loring v. Brodie,* 134 Mass. 453.

It must be held that the note did not become effective in the hands of the People's State Bank and that the plaintiff, becoming holder of it after it was over due, holds it subject to the same infirmity and defect that existed against it in the hands of the bank, and under the facts found plaintiff is not entitled to recover on the note.

By the Court.—The judgment appealed from is affirmed.

STATE EX REL. BAKER and others, Appellants, vs. HAUGEN and others, Respondents.

November 16—December 5, 1916.

Taxation: Assessment: County equalization: Review by tax commission: Jurisdiction: Certiorari: *Hearing before commission: Adjournment: Orders: Making up issues: Evidence: Competency: Delay in determination: Directory statutes.*

1. On *certiorari* to review proceedings of the tax commission in making a redetermination of the values of taxable property in the several taxing districts of a county, following an appeal regularly brought from the assessment by the county board, a decision of the court that such proceedings were void for failure to comply with the statutes did not divest the commission of jurisdiction of the appeal; and the situation thereafter was as though the commission had never attempted to act thereon.
2. An order of the tax commission reciting that a preliminary hearing on such appeal was adjourned from the 10th to the 21st of September was sufficient, in the absence of anything in the record to the contrary, to show that the hearing was so adjourned, and the fact that the order was dated on September 21st, together with the recital therein, was sufficient to show that it was made at the hearing on that date.
3. Where such order provided "that the appeal . . . be and the same is hereby entertained and that a review and redetermination of the relative value of the taxable property of the several assessment districts of said county be granted . . . ; that such a review be made . . . and that the same extend to all towns, cities, and villages in said county and to all the taxable property

therein . . . ," there was a sufficient compliance with the requirements of sec. 1077*f*, Stats., that the commission shall, at the preliminary hearing or an adjournment thereof, determine whether the appeal should be entertained or dismissed, and shall make up the issues between the parties.

4. Under secs. 1077*a* to 1077*l*, Stats., the tax commission has very broad powers in respect to ascertaining the value of the different kinds of property in the taxing districts. Statistics of recorded sales of real estate and of the assessed valuation of lands included in such sales, collected and compiled pursuant to secs. 1007–1009, Stats., and all other information provided for by statutes respecting valuations of property, may be used by the commission in the performance of its duties; and expert knowledge acquired by it may be applied to the facts in evidence in reaching its determination.

5. Sec. 1077c, Stats. (requiring an appeal from the determination of the county board to be taken within four months); sec. 1077*d* (requiring the county clerk "without delay" to prepare and forward certain matter to the commission); and sec. 1077*j* (requiring the tax commission to make its final decision within four months from the making up of the issues upon preliminary hearing) are directory; and a failure of the commission to determine the matter speedily, especially where such delay is occasioned by legal proceedings, does not divest the commission of jurisdiction.

APPEAL from a judgment of the circuit court for St. Croix county: JAMES WICKHAM, Judge. *Affirmed.*

This is an appeal from a judgment in favor of the defendants dismissing the action. A writ of *certiorari* was issued out of the circuit court on the relation of the appellants, residents and taxpayers of several of the assessment districts of St. Croix county, against the tax commission of the state of Wisconsin and the county clerk of St. Croix county.

The purpose of the writ was to bring before the court for review the record of proceedings of the tax commission on reapportionment of the value of taxable property in the several taxing districts in said county. The respondents made return to the writ and a hearing was had. The court dismissed the writ with costs.

The appellants assign the following errors: First. That

the court erred in deciding that the tax commission had jurisdiction to make the final determination as it did. Second. That the court erred in ordering the writ dismissed and in entering judgment dismissing it.

For the appellants there was a brief by *Spencer Haven, N. O. Varnum,* and *McNally & Doar,* and oral argument by *Mr. Haven, Mr. W. F. McNally,* and *Mr. Varnum.*

For the respondents there was a brief by the *Attorney General, E. E. Brossard,* assistant attorney general, and *Chas. A. Cross,* and oral argument by *Mr. Brossard.*

KERWIN, J. The facts in the case appear from the return to the writ of *certiorari.* An appeal was taken by the city of Hudson from the equalization made by the county board of St. Croix county for the year 1913. Certain proceedings were had upon said appeal pursuant to an order and notice by *Nils P. Haugen,* chairman of the Wisconsin tax commission, sitting and acting alone, which proceedings resulted in an alleged decision made July 10, 1914, purporting to review said county assessment and relative valuation of taxable property in the taxing districts in said county. On April 13, 1915, the alleged decision of the tax commission of July 10, 1914, was set aside and held to be void by this court for reasons stated in the opinion. *State ex rel. Ruemmele v. Haugen,* 160 Wis. 494, 152 N. W. 176. After the above decision of this court and on the 21st day of July, 1915, the tax commission proceeded with the discharge of its duties on said appeal and made an order reciting that the city of Hudson had taken its appeal and that the tax commission had attempted to act on the appeal, but that the proceedings taken were void and that the appeal was still pending, as no valid determination of it had been made, and ordered that the preliminary hearing on appeal be had at the city of Hudson on August 20, 1915. Notice of the hearing was given and proceedings had, resulting in the making of a final de-

cision November 23, 1915. The writ of *certiorari* is to review this decision.

1. The main contention here is that the tax commission lost jurisdiction by its first proceedings as determined by this court (160 Wis. 494, 152 N. W. 176), and could not thereafter by any subsequent act acquire jurisdiction, hence all subsequent orders, decisions, and doings of the tax commission were void and of no effect.

Counsel refer to many cases in this and other courts to the effect that when a court loses jurisdiction of a case the jurisdiction cannot be restored by any action of the court, and that on *certiorari* reversal for want of jurisdiction ends the case.

We are of opinion that none of the authorities cited apply to the case before us. In the instant case the tax commission never lost jurisdiction of the appeal. The appeal was regularly brought before the commission, and remained there notwithstanding that certain acts were done and proceedings had beyond the jurisdiction of the tax commission by members of it. In the former proceeding the tax commission never complied with sec. 1077*f*, Stats., therefore never got jurisdiction to further act upon the appeal, hence all proceedings were void. 160 Wis. 494, 152 N. W. 176. But this did not divest the commission of jurisdiction of the appeal. The void acts left the situation as though the commission had never attempted to act upon the appeal. The tax commission was bound to proceed with the hearing on appeal in the manner provided by statute, and until it so proceeded the appeal was pending and its duty unperformed.

We are therefore convinced that the proceedings held void in 160 Wis. 494, 152 N. W. 176, did not divest the tax commission of jurisdiction of the appeal.

2. The next question presented is whether the commission proceeded regularly in the second proceeding after the appeal

and return of the record in *State ex rel. Ruemmele v. Haugen,* 160 Wis. 494, 152 N. W. 176. The learned trial judge below in a written decision said:

"If the tax commission had a duty to perform in reference to this appeal, it could not perform that duty simply by conducting a void proceeding and making a void decision. The setting aside of that void decision could not constitute a performance of the duty with which the tax commission was charged nor defeat the right of appellant to have its appeal determined. No such question was involved nor determined in the *certiorari* proceeding. The judgment in that proceeding simply determined that the commission had not performed the duty imposed on it by statute. The *certiorari* did not bring up or review any other question. *People ex rel. Robinson v. Ferris,* 36 N. Y. 218. I am satisfied that the decision of the tax commission sought to be set aside in this proceeding is valid and that the writ of *certiorari* should be dismissed upon the merits with costs."

A careful examination of the record convinces us that the trial judge was right in so holding.

But it is argued by counsel for appellants that the commission on the second hearing did not comply with sec. 1077*f,* in that it did not determine whether such appeal should be entertained or dismissed, and did not make up the issues between the parties to such appeal as provided by the statute. It is said the record does not show that the hearing was adjourned from September 10th to September 21st, the date of the order. The point is not well made. The order recites that the hearing was adjourned from the 10th to the 21st, and in the absence of anything in the record to contradict such recital is sufficient. It is also said that there is nothing in the record to show that the order was made at the hearing on the 21st. It bears date on the 21st, and this, together with the recital that the hearing was adjourned to that date, is sufficient.

It is also clear that the commission sufficiently made up the issues. The commission ordered

"That the appeal of the city of Hudson from the equalization made by the county board of St. Croix county for the year 1913 be and the same is hereby entertained and that a review and redetermination of the relative value of the taxable property of the several assessment districts of said county be granted as prayed for.

"That such a review be made by and under the direction of the Wisconsin tax commission as provided by secs. 1077*e* and 1077*l* of the statutes, and that the same extend to all towns, cities, and villages in said county and to all the taxable property therein and be completed within four months from the date hereof." . . .

True, the issues might have been defined with more particularity, but the order in that regard was sufficient compliance with the statute.

3. It is further contended that there was no competent evidence adduced at the preliminary hearing or any adjournment thereof sufficient to warrant the commission in finding that injustice had been done to any assessment district. This contention is untenable. The tax commission under the statute is vested with very broad powers in respect to ascertaining the value of the different kinds of property in the taxing districts. Secs. 1077*a* to 1077*l*, Stats.

The statutes also make it the duty of the tax commission to collect from time to time statistics of recorded sales of real estate in each county and of the assessed valuation of lands included in such sales. Secs. 1007, 1008. Sec. 1009 also provides for the compiling and preservation of statistics bearing on sales. All this information provided for by statutes respecting valuations of property may be used by the tax commission in the performance of its duties. In hearings by such bodies as tax commissions the same strict formalities which obtain in courts of law or equity are not required. There is much acquired expert knowledge which

the commission may apply to facts in evidence in reaching its determination. *Chicago & N. W. R. Co. v. Railroad Comm.* 156 Wis. 47, 145 N. W. 216, 974; *Foster v. Rowe,* 128 Wis. 326, 107 N. W. 635.

4. It is further insisted that the law requires a speedy determination of the matter by the tax commission, and the failure of the commission to do so rendered the redetermination of the apportionment void.

The question under this head is, Did the delay occasioned by the proceedings had, including the appeal to this court, divest the commission of jurisdiction? This turns on the provisions of the statutes, secs. 1077*c*, 1077*d*, and 1077*j*. True, the delay in this case was more than ordinary, but the turn which the case took seems to have necessitated the delay, at least in greater part. Sec. 1077*c* requires the appeal to be taken within four months. Sec. 1077*d* requires the county clerk "without delay" to prepare a certified copy, etc.; and sec. 1077*j* requires the tax commission to make its final decision within four months from the making up of the issues upon preliminary hearing. We are of opinion that these statutes must be regarded as directory. *State ex rel. Burnham v. Cornwall,* 97 Wis. 565, 73 N. W. 63; *State v. Zillmann,* 121 Wis. 472, 98 N. W. 543; *State ex rel. Johnson v. Nye,* 148 Wis. 659, 135 N. W. 126; *Application of Clark,* 135 Wis. 437, 115 N. W. 387; *State ex rel. Cothren v. Lean,* 9 Wis. 279.

It follows that the judgment of the court below is right and should be affirmed.

By the Court.—Judgment is affirmed.

McDonald, Respondent, vs. Apple River Power Company, Appellant.

November 17—December 5, 1916.

Navigable rivers: What are: Mills and milldams: Statute construed. Hydroelectric plant is "water mill:" Flooding of lands: Taking for public use: Remedy of landowners.

1. A river which has never been meandered or declared by the legislature to be a navigable river is not shown to be "navigable" within the meaning of sec. 3374, Stats., 1898, by the mere fact that it is so far capable of floating logs as to entitle the public to a right of way therein for that purpose.
2. A hydroelectric plant used to generate electricity for lighting and power purposes, etc., is a "water mill" within the meaning of sec. 3374, Stats.
3. The flooding of lands by the erection and maintenance of a dam to furnish power for such a plant is a taking of the lands for a public use, authorized by the milldam law (secs. 3374–3402, Stats.); and the only remedy of the landowners is that provided by said law.
4. An action by owners of lands so flooded to abate the dam and recover damages for the flowage need not be dismissed, but, under sec. 2836*b*, Stats. 1915, may be treated as an action to obtain compensation and other appropriate relief under the milldam law.

Appeal from a judgment of the circuit court for St. Croix county: George Thompson, Circuit Judge. *Reversed.*

This is an action for the abatement of a dam owned and operated by the defendant company and to recover the damages to plaintiff's premises and to his crops thereon caused by the overflow from such dam.

The defendant has been and now is a corporation existing under the laws of the state of Wisconsin. Before the incorporation of the defendant, F. W. Epley, one of the incorporators, obtained authority from the state of Wisconsin for himself, his successors and assigns to build and maintain a dam across Apple river upon lands he owned which are described in the complaint. The dam was authorized to be

constructed for the purpose of improving Apple river and for the manufacture of flour, feed, and other milling products, and the transmission of electric power, the dam not to raise the water to exceed twenty feet. The dam was constructed in 1903 and in the same year a hydroelectric plant was built at the dam. It is known as "River Dale Dam." The defendant owns another dam, "Somerset Dam," about two and one-half miles from the "River Dale Dam." Both of these dams are used exclusively for the manufacture of electricity. The electric current so manufactured at these two plants is sold to the Consumers Power Company, a foreign corporation, with the exception of a small percentage of such current which is sold to the village of Somerset and the residents thereof for lighting purposes and to the village of Holton. The population of these two villages is less than 1,000 people. The balance of the entire output is sold to the Consumers Power Company, which transmits it by electric line across the state border and sells it in the state of Minnesota for the purpose of supplying light and power to the city of Stillwater and the residents thereof. The city of Stillwater in the state of Minnesota has a population of about 10,000 people. A portion of the electric current is sold by the Consumers Power Company to furnish lights for the Minnesota state penitentiary.

Apple river is located wholly within the state of Wisconsin and is a nonnavigable stream.

The plaintiff is the owner of two tracts of land about two miles up the river from the "River Dale Dam." Plaintiff has been the owner of one of these tracts for more than ten years. Immediately before the commencement of this action he purchased the other tract from William McDonald, who assigned all causes of action then existing in his favor to the plaintiff. The tracts of land are located at an elevation only slightly higher than the surface of the water in the river before the dam was built, and under ordinary conditions this land produces crops of marketable hay.

Before the year 1907 no part of plaintiff's land was flooded or damaged by the defendant's dam, but in 1907 the defendant began the practice of using flash-boards to raise the water in the river over and above the original twenty feet authorized by the act of the legislature. Two feet of flash-boards, it is found, do not affect plaintiff's land, but the defendant has been using more than two feet of flash-boards, and as a result the plaintiff's land is constantly being flooded and the crops being damaged. This has occurred annually since 1907, and neither the plaintiff nor his grantor, William McDonald, has in any manner consented to the raising of the dam by means of flash-boards or in any other manner. Plaintiff alleges that the damages to the crops year after year since 1907 amount to $2,275. The defendant threatens to continue the use of the full three feet of flash-boards. The trial court found that the use of these flash-boards is wholly unnecessary to supply any public use that defendant may reasonably be called upon to supply in the state of Wisconsin.

The circuit court entered judgment in favor of the plaintiff awarding him damages in the sum of $2,275, together with his costs and disbursements of this action, and further ordered, adjudged, and decreed that all flash-boards in excess of two feet over and above the original height of the dam be removed therefrom. From such judgment this appeal is taken.

For the appellant there was a brief by *Brown & Guesmer* and *McNally & Doar,* and oral argument by *Rome G. Brown* and *W. F. McNally.*

For the respondent there was a brief by *Booth & McDonald* and *N. O. Varnum,* and oral argument by *Mr. Frank W. Booth* and *Mr. Varnum.*

SIEBECKER, J. The court found that the defendant is a Wisconsin corporation and that its articles of incorporation

provide "that the business and purposes of said corporation 'shall be improvement of Apple river, development of power thereon, and transmission of same by means of electricity to New Richmond and other points, and the running and operation of a manufacturing plant or plants, which said business is to be carried on within the state of Wisconsin and especially within the county of St. Croix in said state.'" It appears, as found by the court, that Epley, one of the incorporators, had been granted authority by the state of Wisconsin "to construct, reconstruct, and maintain a dam across Apple river upon lands owned by himself" in St. Croix county, such grant providing: "said dam to be constructed for the purpose of improving Apple river and for the manufacture of flour, feed and other milling products and the transmission of electric power; provided that the said dam shall not raise the water to exceed twenty feet." Ch. 185, Laws 1901; ch. 220, Laws 1903. This defendant became vested with the riparian rights appurtenant to the lands where the dam is located and constructed the dam in 1903 at the height authorized. It also appears that the defendant after 1907 has operated the dam with three feet of flash-boards above the authorized height of the dam. The court found as a fact that Apple river is wholly located within the state of Wisconsin, and that it is a nonnavigable river within the meaning of the Wisconsin milldam act (ch. 146, Stats.). These facts are practically free from controversy. The parties radically conflict in their claims as to the rights of defendant in operating this dam and as to its authority to raise the water in excess of the twenty feet authorized by the grant to Epley, if such excess causes flooding of lands not affected by the twenty-foot dam.

The milldam act prior to 1911 (sec. 3374, Stats. 1898) provided: "Any person may erect and maintain a water mill and a dam to raise water for working it upon and across any stream that is not navigable upon the terms and conditions and subject to the regulations hereinafter expressed."

Since the dam in question was constructed in 1903, the rights of the parties became fixed before the 1911 amendment. *Water Power Cases,* 148 Wis. 124, 134 N. W. 330. As above indicated, the trial court found that this dam was erected in a nonnavigable stream within this state. This conclusion is well established by the facts of the case. The question of the test of navigability of streams within the milldam act was fully considered and elaborated in the case of *Allaby v. Mauston E. S. Co.* 135 Wis. 345, 116 N. W. 4. It is there declared that, "In view of the extent to which this court has gone in declaring streams navigable in the sense that they are *public highways,* it is obvious that the word was used in this statute [milldam act] in a very different signification. Its object was to enable the utilization of water power upon many of the important streams of the state." It was there held that the fact that a stream was capable of floating logs, thus entitling the public to a *right of way* therein for such a purpose, did not suffice to show its navigability in the sense of sec. 3374, Stats. Apple river has not been meandered nor declared to be a navigable river by the legislature of the state.

The defendant maintains and operates a hydroelectric plant. The trial court determined that defendant's plant constituted a "water mill and dam" within the sense these terms are used in the milldam law. The word "mill" as defined in the case of *Home Mut. Ins. Co. v. Roe,* 71 Wis. 33, 36 N. W. 594, was considered applicable to its use in this law. It is there said:

"A 'mill' is defined to be '(1) An engine or machine for grinding or comminuting any substance; . . . usually having a word prefixed, denoting the particular object to which it is applied. . . . (2) The building, with its machinery, where grinding or *some process of manufacturing is carried on.*' Webster. 'The original purpose of mills was to comminute grain for food, but the word "mill" is extended to engines or machines moved by water, wind, or steam, for carrying on many other operations.' Imperial."

In *McMillan v. Noyes,* 75 N. H. 258, 72 Atl. 759, the question arose whether a hydroelectric plant was a water mill within the meaning of the milldam act of that state, which had in its provisions the features that are in the act of this state. The court there declared:

"But it is said that the power company does not bring itself within the terms of the statute because it is not maintaining 'a water mill' in connection with its dam. That it has erected a building and installed the necessary machinery for the conversion of the water power secured by its dam into electric power is conceded. The machinery is run by water power, and in the ordinary use of language the establishment might be termed a water mill; that is, a mill operated by water power. That the mill in question falls within the literal meaning of the statute is evident."

The decisions in this court, so far as this question has been considered, are in harmony with the meaning the New Hampshire court gave to the words "water mill" as used in the statutes on the subject. In the *Allaby Case* [*Allaby v. Mauston E. S. Co.* 135 Wis. 345, 116 N. W. 4] it appeared that the power from the dam there in litigation was used to manufacture electricity which was sold to operate a street railway system and to operate a grist mill. It was there determined that the dam was one within the milldam law. We are persuaded that the term "water mill" as used in sec. 3374, Stats., properly includes various kinds of mills operated by water power, and that a hydroelectric plant generating electricity for the manifold uses to which it is applied in modern mechanical, industrial, commercial, and scientific enterprises is a water mill within the meaning of the milldam act. The operation of this dam and the electric plant connected therewith for generating electric energy and distributing it for light, heat, and power purposes has grown to be as much of a necessity to meet the varying demands of the people as the furnishing of hydraulic power in former times for operating grist and other kinds of mills. The erection and maintenance of dams to furnish power for such electri-

cal purposes and the consequent flooding of land by setting back and storing the water of streams is a devotion of such lands to a purpose as public in its nature and character as the use of land in the past for storing water to operate the kind of mills which have been approved as being within the contemplation of the milldam act. The defendant is authorized, as successor to Epley, to construct and maintain this dam "for the purpose of improving Apple river and for the manufacture of flour, feed and other milling products and the transmission of electric power." The actual operation of this dam is in accord with this grant, which in legislative contemplation was evidently deemed to be within the provisions of the milldam act. It follows that defendant has the right to acquire the flowage rights conferred by the provisions of secs. 3374 to 3402.

"These statutes are grounded in the theory, confirmed by the courts, that there is a public interest in the utilization of the water powers of the state to run mills sufficient to justify the exercise of the power of eminent domain in the flooding and consequent taking of lands of individuals. (Citing Wisconsin cases.) Hence that the statute is effective to render lawful the building, the maintenance, and the raising of a milldam as against the individual who suffers merely a flooding and taking of his land. A dam so authorized which does no other damage is therefore not *per se* a nuisance, either private or public. (Citing.) The statute provides a remedy for all such damage, which, by most unambiguous language, it makes exclusive of all others, and to it the courts have therefore uniformly accorded that effect. . . . The utmost right of the individual whose land is flooded or damaged is to seek compensation upon the theory of the continuance of the dam. (Citing.)" *Allaby v. Mauston E. S. Co.* 135 Wis. 345, 351, 352, 116 N. W. 4.

It necessarily follows that the plaintiff must seek his remedy pursuant to the provisions of the statutes embodied in ch. 146, Stats., pertaining to mills and milldams. It was error to entertain the action as one in equity to abate a part

of the flash-boards used as a part of the dam, and hence the judgment must be reversed. The action, however, need not necessarily be dismissed. Ch. 219, Laws 1915 (sec. 2836*b*, Stats. 1915). The action may be treated as a civil action under the statutes, secs. 3374–3402, Stats., for trial before a jury to ascertain the defendant's liability, if any, to plaintiff for the alleged flooding of plaintiff's lands and to try any other appropriate issue as provided in these statutes. *Allaby v. Mauston E. S. Co., supra.*

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court for further proceedings according to law.

FISH, Appellant, vs. COLLINS and another, Respondents.

November 17—December 5, 1916.

Mortgages: Foreclosure: Sale more than twenty years after judgment: Laches: Limitation of actions: Statutes: Construction.

1. The time within which land may be sold under a foreclosure judgment is not limited to twenty years from the rendition of the judgment. Such a proceeding is not an "action" upon the judgment within the meaning of sub. (1), sec. 4420, Stats.
2. The fact that the personal liability of the mortgagor is extinguished does not preclude enforcement of the lien of the mortgage established by the judgment.
3. Sec. 2968, Stats.,—which provides, among other things, that "in no case shall an execution be issued or any proceedings had upon any judgment after twenty years from the time of the rendition thereof,"—applies only to judgments on which execution may issue, and hence is not applicable to a judgment of foreclosure and sale until the coming in of the report of sale and the rendition of judgment for deficiency thereon.
4. Evidence showing, among other things, that a mortgagee foreclosed the mortgage in 1890; that in 1895 he attempted to sell the land under the judgment, but no report of sale was ever made, no deed executed, and the sale was never confirmed; that

he and the mortgagor were neighbors and friends; that during the years 1896 and 1897 he rented the land to a third person; that he supposed until 1914 that he had a deed of the premises and then, upon discovering that he had not, took steps to enforce his judgment,—is *held* to sustain a finding of the trial court that he was not guilty of laches.

5. The right to sell land under a foreclosure judgment more than twenty years after its rendition not being barred by any provision of ch. 177, Stats., the statute cannot be extended so as to bar such right, on the ground of a supposed legislative policy to provide a limitation as to all claims.

6. Statutes creating limitations are to be reasonably and fairly construed, but should not be extended by construction.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Affirmed.*

Plaintiff brought this action to remove a cloud upon his title. The facts are these: On December 15, 1887, plaintiff was the owner of forty acres of land in Sauk county, and on that date he gave a mortgage upon said land to secure the payment of $250. The mortgage was thereafter assigned to the defendant *Collins,* who foreclosed the mortgage, and judgment of foreclosure was rendered on September 15, 1890. In 1895 *Collins* attempted to sell the land under his judgment, but no report of sale was ever made, no deed executed, and the sale was never confirmed. Plaintiff and the defendant *Collins* were neighbors and friends. During the years 1896 and 1897 *Collins* rented the land to one Timothy Howley, and it is claimed that in 1898 the plaintiff made an oral contract with the defendant *Collins* for the purchase of the property in question. The agreement, however, was never consummated. *Collins* supposed that he had a deed of the premises, and on August 1, 1914, discovered the fact that he did not have. He then took steps to enforce his judgment, and the defendant *Hale,* as sheriff, posted notices of sale of the property in question and advertised the same for sale at public auction. The court found the facts substantially as stated and concluded that defendant had not been guilty of

laches; that the judgment was not barred by the statute of limitations; that the judgment of foreclosure and sale is a valid subsisting lien upon the property in question, and that plaintiff is not entitled to the relief prayed for; and judgment was entered accordingly dismissing the complaint. From this judgment plaintiff appeals.

For the appellant there was a brief by *Grotophorst & Thomas,* and oral argument by *H. H. Thomas.*

For the respondents there was a brief by *Bentley, Kelley & Hill,* and oral argument by *Frank R. Bentley.*

ROSENBERRY, J. Plaintiff claims that the judgment of foreclosure and sale entered September 15, 1890, is barred by sub. (1), sec. 4220, Stats., as follows:

"Within twenty years: (1) an action upon a judgment or decree of any court of record of this state or of the United States sitting within this state."

As to this claim it is sufficient to say that advertising the property for sale under the foreclosure judgment is not an action and is therefore not within the terms of sub. (1), sec. 4220.

It is further claimed that, because the personal liability of the plaintiff is extinguished, the lien of the mortgage established by the judgment cannot now be enforced. This court has repeatedly held to the contrary. *Roach v. Sanborn L. Co.* 135 Wis. 354, 115 N. W. 1102, and cases cited.

It is suggested that plaintiff is prevented from asserting any further rights under the judgment of foreclosure by the provisions of sec. 2968, Stats., relating to the issuance of executions upon judgments, which reads as follows:

"Upon any judgment of a court of record which shall have been perfected under the provisions of section 2894*a* or any judgment of any other court docketed in any court of record, execution may be issued at any time within five years after the rendition thereof, and when any execution shall have been

so issued and returned unsatisfied in whole or in part *alias* executions may be issued thereon at any time thereafter. But if no execution shall have been issued thereon within said five years it shall only be issued thereafter upon leave granted by the court or a judge thereof, when it shall be made satisfactorily to appear by the affidavit of the party, his agent or attorney that the judgment or some part thereof remains unsatisfied and due; but in no case shall an execution be issued or any proceedings had upon any judgment after twenty years from the time of the rendition thereof."

Attention is called particularly to the last clause of the section. It may be said that the issuance of the notice of sale and the sale of the property under the judgment in question is not a proceeding upon the judgment. A further answer is that sec. 2968 has no application to a judgment of foreclosure and sale until the coming in of the report of sale and the rendition of judgment for deficiency thereon. The last clause of sec. 2968 was in the nature of a proviso enacted by ch. 11, Laws 1868, the words of the proviso being as follows: "Provided, that no execution shall issue, nor any action or proceedings be had upon any such judgment after twenty years from the time of the rendition or docketing thereof." By the revision of 1878, ch. 14 of the Laws of 1866 and ch. 11 of the Laws of 1868 were combined and the words "nor any action" and the word "such" were omitted. The revisers state that the chapters were rewritten but not materially changed, the words "nor any action" being omitted for the reason that the subject was covered by the chapter on limitations. Independent of the history of the statute, we are of the opinion that sec. 2968 is intended to apply only to judgments on which execution may issue. A judgment of foreclosure and sale is not such a judgment.

The finding of the trial court that the defendant *Collins* was not guilty of laches is sustained by the evidence.

It is contended that an examination of ch. 177, Stats., discloses an intention to provide a limitation as to all claims, and that the court should give effect to the legislative policy

by so construing the statutory law as to create a limitation upon the right of the defendant *Collins* to proceed upon the judgment of foreclosure and sale. His right to proceed not being within the terms of any provision of the statutes, we cannot extend the statute by construction so as to include it. Statutes creating limitations are to be reasonably and fairly construed. *Whereatt v. Worth,* 108 Wis. 291, 84 N. W. 441. But they should not be extended by construction. *Fisk v. Jenewein,* 75 Wis. 254, 43 N. W. 950, 44 N. W. 515. Therefore we are of the opinion that the judgment of the court below is right.

By the Court.—Judgment affirmed.

CLARKE, Appellant, vs. JOHNSON, Administrator, imp., Respondent.

November 17—December 5, 1916.

Executors and administrators: Completing contract of decedent: Assumption of mortgage: Liability for deficiency: Judgment construed.

1. The formal completion by an administrator, under authority of the county court, of a contract made by the intestate, under which land was to be conveyed to him and he was to assume a mortgage thereon, created no personal liability on the part of the administrator for the mortgage debt, nor preferred liability against the estate, but simply a liability on an equal footing with other debts contracted by the deceased.
2. The judgment rendered on foreclosure of such mortgage is construed to be in accordance with the rights and liabilities of the parties as above stated, although some provisions therein seem not to be in harmony with that construction.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from an order of the circuit court reversing an order of a court commissioner requiring the respond-

ent, as administrator of the estate of James P. Corry, to pay to the appellant, *James L. Clarke,* out of funds of the estate in his hands the amount of a deficiency judgment in a foreclosure action. The facts appearing in the record are briefly as follows: One Soelch held a mortgage of $2,500 given by Bascom B. Clarke covering certain real estate in Madison. Clarke made a valid written agreement with one James P. Corry to exchange said land for certain other lands owned by Corry, each party to assume a mortgage covering the land transferred to him. Deeds were prepared to carry out this agreement, but before their delivery Corry died and a special administrator was appointed who was authorized by the county court to carry out the contract with Clarke, and in pursuance of that authority the deeds were exchanged. Later the defendant *Johnson* was appointed general administrator of Corry's estate and received the assets thereof from the special administrator. Afterwards this action was brought by Soelch to foreclose said mortgage, the defendants being Bascom B. Clarke and wife, the widow and heir at law of Corry, and the respondent *Johnson* in his capacity as administrator. Bascom B. Clarke and wife answered, and by way of cross-complaint set up the facts as to the exchange of lands and claimed that as between themselves and the Corry estate the estate is primarily liable for the indebtedness secured by the mortgage. The allegations of the cross-complaint were not denied and judgment of foreclosure and sale was entered August 4, 1914. In this judgment it was found among other things that on January 3, 1913, the administrator of Corry's estate, under the authority of the county court, received a warranty deed from Clarke of the mortgaged lands wherein and whereby the administrator, "on behalf of said estate," assumed and agreed to pay said mortgage and interest, and that thereby said estate, through the defendant *Johnson,* administrator thereof, "became personally liable" for the mortgage debt, and that there is a contingent liability against said estate to pay the deficiency that may arise on the

sale thereof. In this judgment it was, among other things, adjudged that "the defendant Bascom B. Clarke, and *Thomas B. Johnson* in his capacity as administrator of the estate of James P. Corry, deceased, or his successor in office, are liable to the plaintiff" for the payment of the mortgage debt; also, that if the proceeds of the sale of the premises are not sufficient to pay the mortgage debt judgment for such deficiency "be separately rendered against Bascom B. Clarke and *Thomas B. Johnson,* administrator of the estate of James P. Corry, deceased, or his successor in office, who are personally liable therefor," . . . "to be docketed and enforced as in other cases;" also that "as between the defendants Bascom B. Clarke and *Thomas B. Johnson,* in his capacity as administrator of the estate of James P. Corry, deceased, or his successor in office, the administrator is primarily liable to said Clarke for such deficiency, and that the same be certified to the county court of Dane county, Wisconsin, for enforcement."

The premises were sold at foreclosure sale October 23, 1915, to Bascom B. Clarke for $2,350, leaving a deficiency of $743.78, and a deficiency judgment rendered November 6, 1915, by which it was adjudged that Soelch "recover of the defendants Bascom B. Clarke and *Thomas B. Johnson* in his capacity as administrator of the estate of James P. Corry, deceased, the sum of $743.78, with interest thereon from October 23, 1915," being the deficiency aforesaid. On the same day Soelch assigned the deficiency judgment to "*James L. Clarke,* trustee," and his executors, administrators, and assigns, and execution was issued thereon in the usual form, with an indorsement by the attorney of *James L. Clarke* directing the sheriff to levy on the property of *Thomas B. Johnson* in his capacity as administrator of the estate of Corry. The execution was returned unsatisfied, whereupon supplementary proceedings were commenced and the administrator on his examination before the commissioner disclosed the fact that he had in his possession as administrator real and personal property aggregating nearly $15,000 (of which

over $1,700 was cash in banks), and that the claims allowed against the estate amounted to $43,102.90, beside about $45,000 of claims still pending or contingent. On this showing the commissioner ordered the administrator to pay over to the attorney for *James L. Clarke,* assignee, the deficiency judgment with the costs of the supplementary proceedings. This order was reversed by the circuit court, and from the order of reversal this appeal is taken.

For the appellant the cause was submitted on the briefs of *C. F. Lamb.*

For the respondent there was a brief by *Gilbert & Ela* and *Paul D. Carpenter,* and oral argument by *F. L. Gilbert.*

WINSLOW, C. J. The contract of assumption of the mortgage was in fact a contract made by the deceased in his lifetime, and its formal completion by the exchange of deeds under the authority of the county court after Corry's death created no personal liability on the part of the administrator nor preferred liability against the estate, but simply a liability on an equal footing with other debts contracted by the deceased.

The language of the judgment is not fortunate nor apt, but we think that, taken altogether, it may properly be construed as the circuit judge who signed it construed it, namely, as a judgment neither imposing personal liability on the administrator nor giving the claim for deficiency preference over other debts, but declaring it to be a valid claim against the estate on a par with other claims to be certified to the county court for enforcement.

It is true that there are some provisions of the judgment which seem somewhat out of harmony with this construction, but we regard it as the dominant note and thought, the more so as it agrees with the law. A critical review of the various provisions would be of no material value. They may be found in the statement of the case.

By the Court.—Order affirmed.

LAMBRECHT, by next friend, Respondent, vs. HOLSAPLE, Appellant.

November 17—December 5, 1916.

Evidence: Testimony of witness absent from state: Decision as to absence: Review on appeal: Infants: Contracts: Rescission: Recovery of money paid: Rights fixed when action commenced: Burden of proving infancy: Questions for jury: Certificate of baptism.

1. The testimony of a witness taken on a trial in justice's court was admissible, under sec. 4141*a*, Stats., upon the trial of the case on appeal to the circuit court, if at the time of the latter trial he was out of the state.
2. The question in such case whether the witness was out of the state or not was one of fact for the circuit court to decide, and its decision thereof will not be disturbed on appeal unless clearly wrong.
3. In an action to recover money alleged to have been paid by plaintiff while a minor for a horse which, when he offered to return it, the defendant refused to take back, the facts that after the case was tried in justice's court plaintiff placed the horse in care of a friend and left the state and that thereafter, the defendant persisting in his refusal to take it back, the horse was sold, do not affect the rights of the parties in the action, such rights having become fixed when the action was commenced.
4. The burden of proving that he was a minor when he bought the horse was upon the plaintiff; and his own testimony to that effect (given on a former trial) being opposed by evidence that he had then been doing business for himself for some time, and of his declarations out of court that he was of age, and his absence at the second trial being unexplained, the question was one for the jury.
5. A certificate of baptism is not competent evidence of the date of birth of the person baptised.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Adolph Lambrecht bought a horse of defendant, paying therefor $97.50. Thereafter he, so far as competent to do so, rescinded the transaction upon the ground of fraud and of his being a minor. He then, by his next friend, commenced

this action in justice's court to recover the money he paid. At the trial, he renewed his offer to return the horse, but defendant would not receive it. He recovered judgment and the case was appealed to the circuit court. In such court, upon proof satisfactory to the trial judge that he was a nonresident and was out of the state, his evidence taken in the justice's court was permitted to be read in evidence. At the close of the evidence, the court directed a verdict in his favor upon the ground that it conclusively appeared that he was a minor when he purchased the horse and he duly rescinded the transaction before bringing the suit. Judgment was rendered accordingly.

Daniel Ruggles, for the appellant.

For the respondent there was a brief by *Grotophorst & Thomas,* and oral argument by *H. H. Thomas.*

MARSHALL, J. The points suggested by appellant will be briefly referred to.

If respondent was out of the state at the time of the trial, his evidence taken in justice's court was competent to be introduced. Sec. 4141*a,* Stats.; *Szeliwicki v. Connor L. & L. Co.* 163 Wis. 20, 156 N. W. 622.

Whether respondent was out of the state or not, so as to render admissible his evidence taken upon the first trial, was a question of fact for the court to decide. Proof was produced to establish such absence which was deemed *prima facie* sufficient. No evidence to the contrary was offered. It does not appear that the decision in that respect was clearly wrong and therefore it cannot be disturbed. It requires a pretty strong case to warrant overturning the ruling of the trial court on a mere question of competency. *Emery v. State,* 101 Wis. 627, 648, 78 N. W. 145.

There was evidence to the effect that, after the first trial, respondent placed the horse with a friend to take care of and departed from the state. After considerable time, appel-

lant persisting in his refusal to take back the animal, it was sold. Those circumstances do not affect this case. The rights of the parties became fixed before it was commenced. Respondent had a cause of action then or he did not. The trial court ruled right on that question.

Respondent testified that he was but twenty years of age when he purchased the horse. Evidence was given that he had made statements inconsistent therewith in a saloon, where he applied for a drink of intoxicating liquor. He then declared he was of age. There was evidence tending to show that he had been away from his parents' home for a considerable period of time; that he worked in the neighborhood where the particular transaction occurred for a year theretofore, and conducted himself, generally, as an adult. He was permitted to introduce, as part of his evidence, what purported to be a baptismal certificate which contained recitals indicating that he was but twenty years of age when the trade was made. That the certificate, conceding for the case that it was sufficiently authenticated, was not admissible in evidence to prove the date of birth of respondent, is ruled by *Lavin v. Mutual Aid Soc.* 74 Wis. 349, 351, 43 N. W. 143. Permitting it to be introduced as part of respondent's evidence, under the circumstances, gave it all the efficiency of independent evidence.

It follows that, whether the verdict was properly directed must turn on the evidence, leaving out the baptismal certificate. In that view, it is considered that there was a jury question, as to respondent's age. The burden was upon him to establish his claim, by evidence, to the satisfaction of the jury. If there were room in the evidence for the jury to have reasonably found either way, it was error to direct the verdict. That there was such room clearly appears. The trial court would, doubtless, so have held had the baptismal certificate been out of the case. There was a reasonable inference, as the jury might have thought, that respondent was

an adult from the fact that he had been doing business for himself for a considerable length of time. His deliberate declaration out of court that he was of age, a jury might fairly consider of as much weight as his evidence, in his own interest, in court, that he was a minor. His absence, also, from the trial, unexplained, preventing the jury from judging his age by his appearance, was a circumstance worthy to be considered. On the whole it seems that fatal error was committed by not submitting the cause to the jury.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

STATE EX REL. CONWAY vs. DONALD and others, Commissioners of Public Lands.

November 17—December 5, 1916.

Supreme court: Original jurisdiction: School districts: Indebtedness: Change of boundaries: Certiorari.

1. A proceeding by writ of *certiorari* to review the action of the commissioners of public lands in refusing their consent to an order made by the state superintendent transferring to another district 120 acres of land owned by the relator and included in a school district which is indebted to the state trust funds, does not involve any material interest of the people at large, and the supreme court therefore declines to exercise its original jurisdiction therein.

[2. Whether *certiorari* is the proper remedy, and whether in this case the commissioners abused their discretion, not decided.]

CERTIORARI to the commissioners of the public lands.

On the 19th day of January, 1916, the state superintendent of public instruction made an order transferring 120 acres of land owned by the relator, *James E. Conway,* from school district No. 1 of the town of Fountain Prairie and the village of Fall River, and attaching the same to district No. 3

of the town of Calamus, Dodge county, and of the town of Fountain Prairie, Columbia county. District No. 1 was then indebted to the state trust funds in the sum of $14,000.

Sec. 258*d*, Stats., provides that in such case of indebtedness all the property in the district shall stand chargeable with the payment thereof and that the boundaries of such district shall not be changed or altered so as to exclude therefrom any land included therein at the time of making the loan until such loan is paid, without the consent of the commissioners of public lands. The relator filed with the defendants his application for such consent. It appeared from the application that the total assessed valuation of the property in district No. 1 was $609,597 and the value of the land transferred $6,700. The land commissioners met and heard the application and consent was refused.

This is a proceeding by *certiorari* to review the action of the defendants in refusing their consent.

For the plaintiff there was a brief by *Brossard & Zeidler,* and oral argument by *E. E. Brossard.*

For the defendants there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

KERWIN, J. The first question presented is whether this court should take jurisdiction of the case. It is quite obvious that the case is one of private interest. The plaintiff desires to have 120 acres of his land relieved from the burden of indebtedness to the trust fund. It appears from the record that the trust fund is secure whether the 120 acres are detached or not, because the balance of the property is ample security.

We cannot see from the record that the public has such an interest in the controversy as to require this court to take original jurisdiction of the case. We think the instant case does not fall within the rule of any of the cases cited by

plaintiff. This court in the *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, reviewed at length the cases in which this court had exercised original jurisdiction, and on page 498 lays down the rule as to what cases it will take original jurisdiction of.

This case does not fall within any of the cases there referred to unless it be a case where "a state officer declines to perform a ministerial duty, in the performance of which the people at large have a material interest." It seems plain that the people at large have no material interest in the case before us. Whether the property of the plaintiff is detached from district No. 1 and attached to school district No. 3 is a matter in which the people at large have no material interest. It follows, therefore, that this court ought not to take original jurisdiction of the instant case.

We desire in passing to call attention of counsel to two propositions: First, Is *certiorari* the proper remedy? and second, Can it be said upon the undisputed facts in the case that the defendants abused their discretion in refusing consent to change the district boundary? It would seem on the record before us at least very doubtful whether *certiorari* is the proper remedy. However, we do not decide either of these propositions, but suggest them for consideration in case of further litigation.

By the Court.—The court declines to take jurisdiction of the case, and the writ is therefore dismissed without prejudice to such other proceedings as the plaintiff may be advised to institute in the proper court. No costs are allowed either party, except that plaintiff pay the clerk's fees.

CASES DETERMINED

AT THE

January Term, 1917.

CONNELL, Trustee, Appellant, vs. CITY OF KAUKAUNA and another, imp., Respondents.

August 15, 1916—January 16, 1917.

Public utilities: Indeterminate permit: Effect of acceptance: Acquirement of plant by city: Waiver of verdict of necessity: "Purchase:" Condemnation: Eminent domain: Validity of statute and of proceedings: Notice to lienholders: Actual notice: Corporations under same management: Trustee under trust deed: Declaring bonds due: Default in interest: Negotiable instruments: Authority to accept payment: Burden of proof: Condemnation of mortgaged property: Payment of award: Rights of bondholders: Waiver: Election of remedies: Laches: Estoppel.

1. The acceptance, by a public utility, of an indeterminate permit under sec. 1797*m*—78, Stats. (Laws 1907, ch. 499), amounted to a perpetual waiver of a verdict of necessity, as required by sec. 2, art. XI, Const., and a consent that proceedings to acquire its property might be initiated at any time by the municipality and that its property might be acquired in the particular manner prescribed by the act.
2. A proceeding by a city to acquire the property of a public utility under sub. 4, sec. 1797*m*—79, Stats. (Laws 1907, ch. 499), though denominated a purchase and although in some aspects the rights of the parties were contractual, was in the nature of a condemnation proceeding and its effect is to be determined in accordance with the laws governing the exercise of the power of eminent domain.
3. Such a proceeding may be sustained as one in the nature of a condemnation proceeding, although the statute did not require that notice be given to the holders of liens upon the property to be acquired; and it was not essential to the validity of the statute that it should contain such requirement. *Davis v. La C. & M. R. Co.* 12 Wis. 16, and other cases, distinguished and limited.

4. Formal notice of such a proceeding to the trustee under a trust deed of the property to be acquired is sufficient to bind the holders of the bonds secured by such deed.

[5. Whether the public character of the hearing before the railroad commission, provided for in sec. 1797*m*—82, Stats. (Laws 1907, ch. 499), together with the right of review given to bondholders, etc., by sec. 1797*m*—83, as amended by ch. 662, Laws 1911, constituted sufficient notice to bind all bondholders by the determination of the commission, is not determined.]

6. In such a proceeding, formal notice of the hearing before the railroad commission was given to the utility but not to a trust company to which a trust deed of the property, securing bonds, had been given. The president and managing officer of the trust company, who was also the owner or in control of practically all the capital stock of the utility, directed the prosecution of an appeal from the order of the commission. Although he was not an officer of the utility, the attorneys who acted under his direction entered their appearance in its behalf. *Held* that, since the trust company and the utility were not separate in interest and were under the same management and control, the trust company, and through it the bondholders, had actual notice of the proceeding and were bound by the judgment affirming the award of the commission.

7. Under a trust deed providing that in case of a default in payment of interest on the secured bonds the principal thereof should, at the election of the trustee, become immediately due and payable, there was no such default where the trustee advanced the money and paid the interest to the bondholders, even if it did so to conceal from them the true situation; and in any event the principal would not become due, because of a default as to interest, until the trustee in fact so elected.

8. The mere fact that bonds and interest coupons thereon were payable when due at the office of a trust company which was trustee in the trust deed securing the bonds, did not make such trustee the agent of the bondholders to receive payment.

9. Payment of a negotiable instrument must be made to the person having possession of the same or to some person duly authorized to accept payment; and where payment is made to a person not in possession of the instrument the burden is upon the payor to show the authority of such person by clear and satisfactory evidence.

10. The authority of a trustee under a trust deed to act for the holders of the bonds secured thereby is prescribed and limited by the terms of the deed; and a payment to the trustee cannot be held

to be a payment to the bondholders unless made when and as prescribed in the deed.

11. The lien of a mortgage extends to the award made in proceedings for condemnation of the mortgaged property.

12. A city which had notice of a trust deed of the property of a public utility which it was acquiring by condemnation, was bound to see that the amount of the award (which was less than the amount of the bonds secured by said deed) was applied to the satisfaction of the claims of the bondholders; and it could not discharge that obligation by turning the money over to the utility corporation, then insolvent.

13. Where a trust company to which a trust deed securing bonds had been given was the general agent, for investment purposes, of some of the bondholders, with power to accept payment of their bonds, the receipt by such trust company, even before maturity of the bonds, of a part of the award made upon condemnation by a city of the property covered by said trust deed, constituted a payment to said bondholders of their share of the award to the extent of their *pro rata* share of the sum so received; but as to other bondholders, for whom the trust company was not such agent, the receipt of the money by it was not a payment and did not affect their right to their *pro rata* share of the award.

14. The trust deed in such case being for the *pro rata* benefit of all bondholders, and the award being less than the amount of the outstanding bonds, each bondholder became entitled to receive his *pro rata* share thereof.

15. Where in such case, after the trustee named in the trust deed had received the greater part of the award prior to the maturity of the bonds and had so misapplied it that as to some of the bondholders there had been no payment, the successor of such trustee demanded from the city the balance remaining after satisfying a prior lien from a part of the award retained by the city for that purpose, such demand did not constitute an election of remedies or a waiver of any other rights which such successor might assert as representative of the bondholders whose claim to the award had not been satisfied.

16. Nor was such successor trustee barred by laches or estopped from claiming a foreclosure of the trust deed on behalf of said bondholders—who had no actual notice of the condemnation proceeding at the time of the payment, before the bonds were due, to the original trustee—by the fact that, after they became chargeable with notice of the facts by reason of default in the payment of their interest, they permitted the city, without objection or notice of adverse claim, to expend a large sum in betterments of the property.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The action is one to foreclose a trust mortgage, executed by the defendant Kaukauna Gas, Electric Light & Power Company (hereinafter designated the Kaukauna Company) and the defendant *Citizens Savings & Trust Company* (hereinafter called the *Trust Company*). The facts in this case are practically undisputed, and are briefly and succinctly stated in the findings of the circuit court as follows:

"1. That the Kaukauna Gas, Electric Light & Power Company, on April 10, 1906, being then duly organized as a Wisconsin corporation, duly executed the certain trust deed described and set forth in the complaint, and on said day duly executed and delivered to the trustee named therein the $75,000 first mortgage bonds described and in terms as set forth in the complaint, which trust deed was forthwith duly recorded in the register of deeds' office of Outagamie county.

"2. That the trustee named in said deed was the Citizens Trust Company, a trust company organized under the laws of Wisconsin, and in taking said bonds it credited the said Kaukauna Company with the full face value thereof and charged the said company with the amount of $78,340.73, which was the amount theretofore owing to it by the Kaukauna Electric Light Company, which transferred the plant and property covered by said trust deed to said Kaukauna Gas, Electric Light & Power Company in consideration for $51,000 stock in the new company, the $75,000 first mortgage bonds in suit, and $30,000 second mortgage bonds of the said new company. And that there was no other consideration or payment for said $75,000 bonds than as aforesaid.

"3. That the said defendant Kaukauna Company never had sufficient revenue to pay its running expenses and the interest on said $75,000 mortgage bonds. That it turned over to the Citizens Company, the trustee named in said deed, its entire revenues after paying current expenses. That the said Citizens Company, at interest-paying times, charged the said Kaukauna Company upon its books with the full amount of the interest on said $75,000 bonds, and itself paid the interest coupons when presented by the holders or credited the

accounts and pass-books of its customers who held said bonds with the amount of the interest thereon.

"4. That the said Citizens Company transferred said bonds in suit to various of its customers upon receiving from them money with direction to invest the same for them in safe interest-bearing securities. That said customers were not informed by the Citizens Company, prior to or at the time of the transfer, of the nature or name of the securities that would be or were being purchased with such money.

"5. That the property covered by said trust deed was at the time of the execution of said deed not worth to exceed $50,000 and that seventy-five per cent. of the face value of said $75,000 bonds was never paid to or received by said Kaukauna Company therefor.

"6. That the franchise to operate said plant in the city of *Kaukauna* as an electric light and power plant expired by its terms in 1904, and that at the time said bonds were issued the company had no franchise or right to operate said plant in *Kaukauna* except at the mere will or sufferance of the city of *Kaukauna*. That in 1908 the defendant Kaukauna Company duly took an indeterminate franchise under the Public Utilities Law of the state. That the trustee named in said trust deed, or the holders of said bonds, never in express terms consented to the taking of said indeterminate franchise, but the said trustee at all times knew of the taking thereof.

"7. That on December 27, 1910, the defendant city of *Kaukauna* duly determined to purchase said plant under the said Public Utilities Law and took due proceedings to that end by duly notifying the railroad commission and said company of its said determination. That thereupon the said commission, in accordance with the terms of said Public Utilities Law, duly notified the defendant city and the defendant Kaukauna Company of the time and place of hearings and proceeded in due course to determine the value of said plant. That no notice of its determination to purchase said plant was ever given by the city to the bondholders and no formal notice was ever given by it to said trustee, but the said trustee in fact knew of said determination and of all proceedings had before said railroad commission and never made any objection thereto or intervened therein or sought hearing therein other than was given to said Kaukauna Company and

said city. That said railroad commission never gave to said trustee or said bondholders or any thereof notice of said proceedings before it or of any hearings therein. That said railroad commission in all things duly proceeded according to the terms of said Public Utilities Law as the same at the time stood, to determine the value of said plant, and on December 29, 1911, determined the value thereof to be $50,000, and directed the payment of said sum by said city to said Kaukauna Company and the transfer of said plant by said company to said city.

"8. That on January 2, 1912, the said city took possession of said plant and has ever since remained in possession and control thereof and has received all the revenues therefrom, and has claimed to be the absolute owner thereof free from the lien of the said trust deed, all to the knowledge of said trustee ever since the transfer.

"9. That on July 11, 1912, the defendant city paid to the defendant Kaukauna Company the said sum of $50,000, with interest thereon to date of payment and the value of supplies turned over to the city by said company not included in said $50,000 award, less the sum of $6,500 retained by said city, pursuant to stipulation with said Kaukauna Company, to secure the defendant city against a claim of the Green Bay & Mississippi Canal Company in litigation claimed by said canal company to be superior to the lien of said trust deed, the total amount paid on said day to said Kaukauna Company being the sum of $45,294.40. That said city paid said money in the expectation and on the understanding that the Kaukauna Company would pay the same over to the trustee for the benefit of the holders of said $75,000 bonds and that the said trustee would hold and pay the same to the said bondholders *pro rata* according to their holdings; and that the city entertained the opinion, in good faith, that the said trustee was managing and for a long time had been managing the said plant and applying its revenues for the benefit of the bondholders, and understood that it was in reality and in fact paying the same into the hands of the trustee.

"10. That said Kaukauna Company on said July 11th deposited said $45,294.40 paid to it as aforesaid with said Citizens Trust Company, the trustee under said trust deed, and said Citizens Company held the same until the 19th day

of July, upon and after which it applied and paid out the same as directed by said Kaukauna Company as follows: some $20,000 to itself to repay itself for interest on bonds advanced to said Kaukauna Company; some $7,000 to itself to repay itself for so-called first lien improvement bonds by it taken, issued to provide for betterments to the plant ordered by the railroad commission in service proceedings instituted by the city of *Kaukauna;* and some $15,500 to favored bondholders, the face and interest on bonds of said $75,000 issue held by them; and the remainder to diverse general creditors of said Kaukauna Company.

"11. That no action was taken in the course of said purchase proceeding to take the verdict of a jury as to the necessity of the taking of said plant by the city.

"12. That the Citizens Company had full knowledge when it transferred said bonds to said bondholders that the same were issued for less than seventy-five per cent. of the face value thereof, but that the holders to whom it transferred the same had no knowledge or notice of such fact and purchased the same for value before maturity.

"13. That the said bondholders received no interest on their said bonds on November 1, 1912, and then learned of the said purchase proceedings by the city, that the said purchase price had been paid, and that the city had been in possession of said property since the previous January under claim and belief in good faith that it had the absolute title thereto free from the lien of said trust deed, and that it had made considerable and was making and was about to make extensive and costly improvements in said plant; that the city made said improvements on the understanding and belief that the bondholders acquiesced and were acquiescing in its said claim, and that said bondholders did acquiesce therein until the 24th day of July, 1914, when the present trustee first notified the city that he claimed the lien of said trust deed was still in force and that he had right to sell said property under foreclosure to satisfy the same. That the cost of the improvements thus made by the city approximated $30,000, and the greater part thereof were made between April 1, 1912, and July 24, 1914.

"14. That the present trustee was appointed to succeed said Citizens Trust Company as trustee on May 12, 1914, and

that on May 27th thereafter he formally and after deliberate consideration demanded of the defendant city that it pay to him for the bondholders the residue of said $6,500 held by it to protect itself against the lien which was adjudged prior to that of said trust deed, and that the city now has in its hands the sum of $2,084.85, the residue of said $6,500 retained as aforesaid.

"15. That the Kaukauna Company duly began an action in the circuit court for Dane county to review the determination of the railroad commission fixing the value of the said plant and said case was pending until September 2, 1914, when the said determination was affirmed.

"16. That the bonds of said issue outstanding and unpaid aggregate the sum of $59,500, with interest thereon since May 1, 1912, and that they are held as follows: . . ."

The facts in relation to the connection of James M. and Thomas J. Pereles with the transaction detailed in the findings are not set out in the findings although shown by the undisputed evidence. It appears that on April 10, 1906, the Kaukauna Electric Light Company resolved to sell its plant to the Kaukauna Company. The stockholders of the vendor company were the president and secretary and treasurer of the *Trust Company*. The price by the offer was $156,000, to be paid by the issue of 510 shares of $100 each of the stock of the Kaukauna Company, and $75,000 of its first and $30,000 of its second mortgage bonds. The offer was on the same day accepted and the 510 shares issued, one share to James M. Pereles and one share to Thomas J. Pereles, and one to W. W. Allis, and 507 to A. R. Coates. But by an assignment dated April 9, 1906, Coates transferred the 507 shares to James M. and Thomas J. Pereles; so that from the beginning they owned all but one share of the stock. James M. and Thomas J. Pereles were at once made president and secretary and treasurer of the Kaukauna Company, and were at the same time president and vice-president of the *Trust Company* and owned over five sixths of its stock and dominated and controlled both companies then and dur-

ing all the time covered by the findings in this case. The by-laws of each company authorized its president to carry on the business of the corporation and manage the same, and the vice-president to co-operate with the president. April 10, 1906, the stockholders and directors of the Kaukauna Company resolved to accept the offer of the Kaukauna Electric Light Company and that the stock and bonds be issued; that the bonds be secured by trust deeds to the *Trust Company;* that the deeds and bonds be such as the *Trust Company* should require, and that the $75,000 of first mortgage bonds be delivered to James M. and Thomas J. Pereles and that $30,000 of second mortgage bonds be delivered to W. W. Allis. On the same day the trust deed in suit was made to secure the $75,000 of bonds and another to secure the $30,000 of second mortgage bonds. On April 10, 1906, Coates owed the *Trust Company* $31,863.35, and the vendor owed the *Trust Company* $46,477.38. Thereupon the *Trust Company* opened an account with the Kaukauna Company, charged it with said debts, $78,340.73, and credited it with $75,000 of bonds. May 2, 1906, such bonds were delivered to James M. and Thomas J. Pereles, but they were dated April 10, 1906, treated as then issued, and many of them sold between such dates. Many customers of the *Trust Company* left money with it to invest, with authority to care for and protect the loans and security while they ran. It kept a deposit account with each customer, and in his pass-book was entered the deposits and the amount paid for securities and all interest paid. It thus invested between April 10, 1906, and 1912 the deposits and balances of various customers in the $75,000 issue of bonds. It appears that some of the customers authorized the Pereles firm and the *Trust Company* to make, continue, care for, and protect their investments, leaving the bonds in the custody of the *Trust Company* with very general powers in respect to them; while other customers had the custody of their bonds and cared for

or looked after the investments themselves. To secure and protect such investments, James M. Pereles and Thomas J. Pereles, owning substantially all of the stock of the Kaukauna Company, managed it, either personally or through a representative, they at all times retaining a substantial control.

The law firm of Nathan Pereles & Sons consisted of James M. Pereles and Thomas J. Pereles. Its offices and those of the *Trust Company* joined on the main floor of the Pereles Building in Milwaukee. The main office of the Kaukauna Company was in the rooms of that firm and therein the corporate meetings of that company and of the *Trust Company* were held. On June 28, 1908, James M. and Thomas J. Pereles, through their representative in charge of the Kaukauna Company, directed the company to surrender its franchise and take an indeterminate permit.

James M. Pereles died December 11, 1910, and Thomas J. Pereles was thereafter his executor, and the management of the affairs of the *Trust Company* and of the Kaukauna Company were subject to his direction. The Kaukauna Company never earned interest on the $75,000 of bonds, and the *Trust Company* advanced it until November 1, 1912. It also advanced the money to cover the cost of certain improvements which the company was required to make by order of the railroad commission. So that on July 16th the Kaukauna Company owed the *Trust Company* about $27,000. Upon receipt of the $45,294.40 paid to it by the city on July 11, 1912, the Kaukauna Company, at the direction of Thomas J. Pereles, turned this amount of money over to the *Trust Company* and at his direction subsequently gave the following directions as to payment: (1) Principal and interest of $7,000 of bonds to pay for such improvements; (2) all interest advanced for first mortgage bonds; (3) sum of $1,901.22, expense of management; (4) balance to take up mortgage bonds, principal and interest. In carrying out the

directions of Pereles the *Trust Company* paid principal and interest of $15,500 of the first mortgage bonds in full.

Upon the facts as found and upon the undisputed evidence the court concluded as follows:

"1. That the said proceedings of purchase did not operate, of themselves, to divest the lien of said trust deed or to transfer said plant to the defendant city freed from said lien.

"2. That said bonds and all thereof were void while in the hands of the original holder; but that the said bonds are negotiable instruments under the Negotiable Instrument Law of Wisconsin, and the holders thereof are holders in due course before maturity and hold the same free from defenses available to prior parties among themselves and may enforce payment for the full amount thereof.

"3. That the trustee under said trust deed, by virtue of the terms of the deed and the facts found, had authority to receive the purchase money of said plant as determined by said railroad commission and apply the same or take action to have the same applied upon said bonds for the benefit of the bondholders *pro rata,* and that the receipt of the purchase money by the trustee operated to restrict the trustee and the bondholders to the remedy of impressing said purchase money with the lien of said trust deed and to release the said plant from the lien of said trust deed.

"4. That the plaintiff is barred by laches and estopped from foreclosure of the trust deed by reason of the acquiescence of the bondholders in the position of the city and permitting the city, without objection or notice of adverse claim, to expend so large a sum in betterments after November 1, 1912, when the bondholders received notice of the facts found.

"5. That the notice of the present trustee that he claimed and demanded payment to him of the residue of said $6,500 in the city's hands was an election of remedies, and constituted waiver of right, if any there then was, to foreclose said trust deed, and that plaintiff should be restricted to the remedy then selected, of ratifying the transfer of the said plant by the city and impressing the purchase money with the lien of said trust deed.

"6. That the plaintiff is entitled to judgment against the Kaukauna Company for the full amount of the bonds unpaid and interest thereon as found; and that he is also entitled to judgment against the city of *Kaukauna* for payment to him of the said sum of $2,084.85, the said residue in its hands, less the costs and disbursements of the defendant city to be taxed.

"7. That the defendant the city of *Kaukauna* is entitled to judgment upon its counterclaim quieting its title to said plant free and clear from the lien of said trust deed and any and all other claims of the parties hereto; and that the city is entitled to recover its taxable costs and disbursements herein and deduct the same from the residue of the purchase money adjudged to be paid to the plaintiff."

It is also undisputed that at the time of the purchase proceedings and the payment of the money the mayor and the city attorney, who acted for the city, had actual knowledge of the mortgage and its terms and paid the money to the Kaukauna Company at the request of the Pereles firm.

From the judgment entered in accordance with the conclusions of the court plaintiff appeals and alleges that the conclusions of law are erroneous and that the findings and the undisputed evidence do not sustain the judgment.

The cause was argued on May 26, 1916.

For the appellant there were briefs by *Lines, Spooner, Ellis & Quarles,* and oral argument by *George Lines.*

For the respondent *City of Kaukauna* there was a brief by *Geo. G. Greene* and *Jerome R. North,* and oral argument by *Mr. North.*

On June 13, 1916, it was ordered that the parties file additional briefs on the following questions:

1. Were the rights of bondholders in any event impaired by the exchange without their consent of the franchise for an indeterminate permit?

2. Was the trustee empowered by the trust deed to represent the bondholders in the purchase proceedings, or bind

them in any way, by action or nonaction, and if not, could the legislature give him such power without consent of bondholders?

3. Can the purchase law be sustained as in substance a valid condemnation statute?

Prior to August 15, 1916, additional briefs were filed by the attorneys above named. A brief was also filed by *Charles F. Fawsett, amicus curiæ,* and a reply thereto by *Geo. G. Greene* and *Jerome R. North,* attorneys for the respondent city.

The following opinion was filed November 14, 1916:

ROSENBERRY, J. The fundamental question in this case is: What is the nature and effect of the proceedings taken by the city of *Kaukauna* to acquire the property of the Kaukauna Company? If the proceeding is purely contractual and is to be governed wholly by the law of contract, one result will follow; if, on the other hand, it is in the nature of a condemnation proceeding, it will be governed by the law of eminent domain and a different result will be reached. The solution of this question involves an examination of the Public Utilities Act, under which the proceedings were had. No collateral questions are presented.

The city of *Kaukauna* is admittedly a municipality, the Kaukauna Company admittedly a public utility, and all the requirements of the law as it then stood were admittedly complied with; so that the sole question presented for solution is: What was the nature and effect of the proceedings had?

The provisions of the law so far as they are material to the solution of this question are as follows:

(1) An indeterminate permit is every grant from the state, to any corporation, of power to own, operate, manage, or control any plant for furnishing heat, light, water, or power to or for the public, which permit shall continue in

force until the municipality shall exercise its option to purchase as provided by this act. Sub. 5, sec. 1797*m*—1, Stats. (Laws 1907, ch. 499).

(2) Every license, permit, or franchise hereafter granted to any public utility shall have the effect of an indeterminate permit, subject to the provisions of this act and subject to the provision that the municipality in which the major part of the property is situate may purchase the property of such public utility at any time as provided herein, paying therefor just compensation to be determined by the commission. Any such municipality is authorized to purchase such property and every such public utility is required to sell such property at the value and according to the terms and conditions determined by the commission as herein provided. Sec. 1797*m*—76 (Laws 1907, ch. 499).

(3) Any public utility being at the time a corporation of the state of Wisconsin operating under an existing franchise shall on surrendering the same prior to January 1, 1911, receive by operation of law in lieu thereof an indeterminate permit, and shall hold such permit subject to all the terms, conditions, and limitations of this act. Sec. 1797*m*—77 (Laws 1909, ch. 180).

(4) Any public utility shall by acceptance of any such indeterminate permit be deemed to have consented to a future purchase of its property by the municipality for the compensation and under the terms and conditions determined by the commission, and shall thereby be deemed to have waived the right of requiring the necessity of such taking to be established by the verdict of a jury and to have waived all other remedies and rights relative to condemnation, except such rights and remedies as are provided by this act. Sec. 1797*m*—78 (Laws 1907, ch. 499).

A municipality may acquire a public utility in one of four ways:

1. Any municipality shall have the power, subject to the provisions of the Public Utilities Act, to construct and operate a plant and equipment or any part thereof.

2. Any municipality shall have the power, subject to the provisions of the Public Utilities Act, to purchase by agreement with any public utility any part of any plant, provided that such purchase and the terms thereof shall be approved by the commission upon hearing.

3. Any municipality shall have the power, subject to the provisions of the Public Utilities Act, to acquire by condemnation the property of any public utility actually used and useful for the convenience of the public then operating under a license, permit, or franchise in existence at the time of the enactment of the Public Utilities Law or operating in any municipality without a permit or franchise.

4. Any municipality shall have the power, subject to the provisions of the Public Utilities Act, to acquire by purchase, in accordance with the provisions of this act, the property of any public utility actually used and useful for the convenience of the public operating under any indeterminate permit as provided by law. Sec. 1797*m*—79 (Laws 1907, ch. 499).

In the instant case the city elected to proceed under sub. 4 of sec. 1797*m*—79. The proceedings to acquire an existing plant not operating under an indeterminate permit, under the law as it then stood, were as follows: Upon the determination by a municipality by a majority vote of its electors to acquire an existing plant,

"such municipality shall bring an action in the circuit court against the public utility as defendant praying the court for an adjudication as to the necessity of such taking by the municipality, in which action the complaint shall be served with the summons. The public utility shall serve and file its answer to such complaint within ten days after the service thereof, whereupon such action shall be at issue and stand

ready for trial upon ten days' notice by either party. Unless the parties thereto waive a jury, the question as to the necessity of the taking of such property by the municipality shall be as speedily as possible submitted to a jury." Sec. 1797*m*—80 (Laws 1909, ch. 213).

Upon the determination of a municipality to acquire an existing plant by a majority vote of its electors, if the public utility owning such plant shall have consented to the taking over of such plant by the municipality by the acceptance of an indeterminate permit as provided herein, or, in case such public utility shall not have waived or consented to such taking, if the jury shall have found that a necessity exists for the taking of such plant, then the municipality shall give speedy notice of such determination and of such consent or such verdict of a jury to the public utility and to the commission. Sec. 1797*m*—81 (Laws 1909, ch. 213).

The commission shall thereupon, after public hearing and within three months from the receipt of such notice and upon notice to the municipality and the public utility interested, determine and certify the just compensation to be paid, together with all the terms and conditions of sale. Sec. 1797*m*—82 (Laws 1907, ch. 499).

If either party to the proceeding is dissatisfied with the order, it may commence and prosecute an action to review it. Secs. 1797*m*—83 to 1797*m*—85 (Laws 1907, ch. 499).

It will be noted that the only difference between the proceeding under sub. 4 of sec. 1797*m*—79, which is denominated a proceeding to acquire by purchase as provided under the Public Utilities Act, and the proceeding under sub. 3 of sec. 1797*m*—79, which is denominated a proceeding to acquire by condemnation, is that in the one case the verdict of a jury as to necessity is required, and in the other it is deemed to have been waived by the fact that the utility has accepted an indeterminate permit.

Under the law, is the acceptance of an indeterminate per-

mit anything more than a waiver by the utility of a verdict of necessity as required by the constitution?

Sec. 2, art. XI, Const., is as follows: "No municipal corporation shall take private property for public use, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury."

Clearly, if the owner consent, no verdict is required, and thereafter, under the statute, the proceedings are the same under both subdivisions. While the proceeding is denominated a "purchase" by sub. 4, and the relation of the parties is said to be to some extent contractual, it must be conceded that upon the acceptance of an indeterminate permit by a public utility the relationship between the municipality and the public utility is something more than contractual. If it were merely contractual the parties might, by contract, restore themselves to their original position. This they cannot do, the municipality having no power in the premises. The property of a utility by the acceptance of an indeterminate permit acquires a status which cannot be changed except through act of the legislature.

It seems to us that the acceptance of an indeterminate permit by a public utility amounts to this: that a verdict of necessity is thereby perpetually waived and the utility consents that proceedings to acquire its property may be initiated at any time by the municipality and it consents that its property may be acquired in the particular manner prescribed by the act. The municipality acquires the same rights when a verdict of necessity is rendered in proceedings under the act and the utility does not consent, the proceedings in both cases thereafter being identical.

A verdict of necessity may be and often is waived in condemnation proceedings, leaving the amount of compensation to be paid for the property taken the sole question for determination. Such proceedings are, however, condemnation proceedings. The damages are thereafter to be determined

in accordance with the law relating to the exercise of the power of eminent domain and not in accordance with the law of contract.

We conclude, therefore, that the proceeding in this case is in the nature of a condemnation proceeding, and the effect of the proceeding is therefore to be determined in accordance with the laws governing the exercise of the power of eminent domain. In arriving at this determination we have considered the fact that the proceeding is denominated a "purchase" in the act itself, and that in some aspects the rights of the parties are contractual and are thus spoken of in prior decisions of this court.

But it is said that the proceeding cannot be sustained as one in the nature of a condemnation proceeding, because as the law stood at the time there was no provision requiring that notice be given to lienholders, and *Davis v. La C. & M. R. Co.* 12 Wis. 16; *Kennedy v. M. & St. P. R. Co.* 22 Wis. 581; *Wooster v. S. R. V. R. Co.* 57 Wis. 311, 15 N. W. 401; and *Stamnes v. M. & S. L. R. Co.* 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62, are cited to our attention as sustaining this proposition. While there is a remark in the *Davis Case* which tends to support the view that a valid condemnation can only be had where the persons interested in the property, including mortgagees, are before the court, a study of all the cases convinces us that what was being dealt with and what was in the mind of the court was the matter of condemnation by railroad companies under special charters or general laws, all of which contain provisions similar to the provisions of secs. 1846 and 1847, which require that notice be given to the owner and to *persons interested in the premises.* We think the decisions in these cases are referable to the statute law and do not decide that there can be no valid condemnation except upon notice to lienholders; especially so in view of the fact that other statutes relating to the exercise of the power of eminent domain which require notice to the

owner only have stood unchallenged for fifty years. Under secs. 605–609 and sub. 9, sec. 1494*t*—3, Stats., providing for condemnation directly by the state, ten days' notice of the application for commissioners is required to be served upon the owner or given by publication. Five days' notice of the meeting to fix compensation is provided, which may be served personally upon the *owner* or by leaving it at *his* abode. By secs. 694*c*, 694*e*, and sub. 3, sec. 1317*m*—6, Stats., counties may condemn for all county purposes on notice to the *owner only*. Sec. 895, Stats., and subsequent sections authorize villages to exercise the right of eminent domain on notice of the proceedings and meetings to the *owner or occupant*. Secs. 1265, 1266, and 1267, Stats., authorize towns to condemn lands for highway purposes on notice to *all the occupants*. Secs. 1379—3 and 477–484, Stats., authorize condemnation by school districts and for drainage purposes upon notice to the *occupant and owner*. So statutes for taxation provide for *notice to the owner only*. While there is a conflict of authority, there are many cases holding that such statutes are not unconstitutional for failure to require notice to lienholders. *Fitchpatrick v. Botheras*, 150 Iowa, 376, 130 N. W. 163; *Harkins v. Asheville*, 123 N. C. 636, 31 S. E. 853; *Kinnie v. Bare*, 80 Mich. 345, 45 N. W. 345; *Goodrich v. Board of Comm'rs*, 47 Kan. 355, 27 Pac. 1006; *Baldwin v. Moroney*, 173 Ind. 574, 91 N. E. 3; *Eau Claire v. Eau Claire W. Co.* 137 Wis. 517, 533, 119 N. W. 555.

The owner in this case having consented, by the acceptance of an indeterminate permit, that its property be taken, the taking was not against the consent of the owner, and the verdict of a jury as to necessity was not required. Under the facts in this case the question of taking was a legislative one, and the power to make the determination of that question was vested in the electors of the municipality, whose decision was in that respect conclusive.

The consent of the owner to the taking being equivalent to

notice to the owner, the case stands as if the statute required notice to the owner and such notice had been given; and the taking is a valid one although no notice was given or required to be given to lienholders, and for reasons above stated the law is valid.

The property being appropriated by the municipality for public use, the law provided the means by which the amount of compensation to be paid therefor should be fixed, as follows: The commission was required to give notice of a public hearing within three months of the date of the notice of the municipality's determination to take the property, to the municipality and the utility, and upon this public hearing the commission was required to fix the compensation and the terms and conditions of the sale and purchase, which were required to be reasonable. Sec. 1797*m*—82 (Laws 1907, ch. 499).

Secs. 1797*m*—83 to 1797*m*—85 (Laws 1907, ch. 499) provide the method for reviewing the order of the commission by appeal to the circuit court. Sec. 1797*m*—83 was amended by ch. 662 of the Laws of 1911, in effect July 21, 1911, by the insertion of the italicised words, to read as follows:

"Any public utility or the municipality *or any bondholder, mortgagee, lienor or other creditor of the public utility,* being dissatisfied with such order, may commence and prosecute an action in the circuit court to alter or amend such order or any part thereof, as provided in sections 1797*m*—64 to 1797*m*—73, inclusive, and said sections so far as applicable shall apply to such action."

The award of the commission was made December 26, 1911; so that at the time the award was made the law provided a method by which any bondholder might have the order of the commission reviewed. While sec. 1797*m*—82 did not require notice to any one other than the municipality and the public utility, the hearing was a public one before an

administrative commission and any person having an interest in the subject matter of the hearing might upon application be heard. It is claimed that the public character of the hearing provided for under the law as it stood prior to the amendment of 1911, and the right of review given by sec. 1797*m*—83 as amended, constitute sufficient notice in an administrative proceeding to bind all bondholders, and *Newton v. Superior,* 146 Wis. 308, 130 N. W. 242, 131 N. W. 986; *Hodge v. Muscatine Co.* 196 U. S. 276, 25 Sup. Ct. 237; and *Nelson v. Waukesha,* 147 Wis. 163, 132 N. W. 887, are cited as sustaining this proposition.

While the determination in such a proceeding is of such a public character that every one affected by it may be chargeable with notice of it, we do not find it necessary to rest the decision in this case upon that ground.

It appears that in accordance with the statute as it stood prior to the amendment formal notice was given to the municipality and to the Kaukauna Company, but that no formal notice was given to the *Trust Company.* It does appear, however, that the officers of the *Trust Company* had actual notice of the proceeding. Thomas J. Pereles, at that time the president and managing officer of the *Trust Company,* and the owner or in control of practically all of the capital stock of the Kaukauna Company, directed that an appeal be prosecuted from the order of the commission. The attorneys who appeared at his direction and prosecuted the appeal entered their appearance in behalf of the Kaukauna Company, although at the time he was not an officer of the Kaukauna Company. It must be remembered that under the facts in this case there was but one interest, the Pereles firm, which was represented by the Kaukauna Company and the *Trust Company.* They owned all but one share of the capital stock of the Kaukauna Company and 2,560 shares of the 3,000 shares of the capital stock of the *Trust Company.* Each of these concerns derived all of its authority from one

common source and they were all subject to the management and control of Thomas J. Pereles, and were all carried on for the benefit of and in the interest of the Pereles firm. It would be nonsense for us to say that the *Trust Company* had no notice of the proceedings to fix the compensation, when its managing officer who owned it was engaged in the prosecution of an appeal in the proceeding and from which the *Trust Company,* and through the *Trust Company* the bondholders, derived every benefit that could have been derived had the appearance of the attorneys employed by him been made in the name of two of his companies instead of one.

The case might be very different if the Kaukauna Company and the *Trust Company* were in fact separate in interest and were managed and controlled and owned by different persons. It does not appear that any bondholder had actual notice of the condemnation proceedings. However, upon the whole record we must hold that the trustee, and through the trustee the bondholders, are bound by the judgment of the circuit court affirming the award of the commission. Formal notice to the trustee would have been sufficient under all the authorities to bind the bondholders claiming under the trust deed. *Iowa Co. v. M. P. R. Co.* 24 Wis. 93; *Swift v. State L. Co.* 71 Wis. 476, 37 N. W. 441; *Vetterlein v. Barnes,* 124 U. S. 169, 8 Sup. Ct. 441.

The amount awarded as just compensation for the property of the Kaukauna Company was $50,000, and the award was affirmed November 21, 1914, by judgment of the circuit court. It being established that the trustee and the bondholders are concluded by the award, we come now to the distribution of the proceeds of the award, a difficult and disagreeable question. This court has well said:

"When one enjoying the confidence of the community in which he has acted as intermediary between investors and borrowers of money proves to have been both dishonest and insolvent, complications arise of the most serious character, in which the attempt to do justice must, of necessity, be pain-

ful to the courts; for, whatever the result, one party or the other—and often both—must suffer injury; sometimes ruin. The strain upon the human sympathies is frequently such as to render difficult adherence to settled rules of law, which, in individual cases, may seem to cast the burden of the wrong on him who can least well bear it. Such rules, however, become established upon many and varied considerations as likely, in the long run, to approximate most nearly to justice, and to minimize the wrong as far as possible, and must be applied by a court until, if the desired results are not obtained, the lawmaking power shall readjust them." *Loizeaux v. Fremder,* 123 Wis. 193, 197, 101 N. W. 423.

Whatever our personal inclinations may be, our duty is clear; it is to hew to the line, let the chips fall where they may; to apply the law to the facts as they appear, let the result be what it may. In this case it appears without dispute that the amount of bonds outstanding at the time the award was made was $75,000, and there was retained by the city out of the award of $50,000 the sum of $6,500, out of which a first lien on the property was to be liquidated, there being at the time a dispute as to its validity, it afterward being decreed a valid lien. *Green Bay & M. C. Co. v. Kaukauna G., E. L. & P. Co.* 157 Wis. 412, 147 N. W. 701. After the payment of the first lien out of the $6,500, the sum of $2,084.85 remained and still remains available. On July 11, 1912, the city paid to the Kaukauna Company $45,294.40, being the remainder of the award plus accrued interest to date after deducting $6,500. The Kaukauna Company in turn paid it to the *Trust Company,* which held it for some days and then, upon direction given by the Pereles firm through the Kaukauna Company, disbursed it in a certain specified way, and of the amount disbursed approximately $15,500 was paid the bondholders.

The trial court concluded as a matter of law that the *Trust Company* had under the terms of the trust deed "authority to receive the purchase money of the said plant as determined by the said railroad commission and apply the same or take

action to have the same applied upon said bonds for the benefit of the bondholders *pro rata,* and that the receipt of the purchase money by the trustee operated to restrict the trustee to the remedy of impressing said purchase money with the lien of said trust deed and to release the said plant from the lien of said trust deed." Or, in effect, that the payment to the *Trust Company* was in fact a payment to the bondholders and that thereafter the bondholders had no remedy excepting a personal claim against the trustee.

Appellant contends that this conclusion is erroneous. The trust deed was in the usual form of such instruments, and from the decision of the trial court it appears that the court based its conclusions upon article VI of the trust deed, which is as follows:

"In case default shall be made in the payment of any instalment of interest on any of the bonds issued hereunder, then and thereupon the principal of all the bonds secured by the mortgage shall, at the election of the trustee, become immediately due and payable; or in case any proceedings or action or any other steps be commenced or instituted for the foreclosure or enforcement of any second or subsequent mortgage by said company, against said property, or any portion thereof, then and thereupon the principal of all the bonds secured by this mortgage shall become immediately due and payable without notice."

It appears without dispute that the instalment of interest due May 1, 1912, was advanced by the *Trust Company* and paid to the bondholders without knowledge on their part as to its source. The trial court says:

"Obviously the *Trust Company* did not make the payment of interest to the bondholders on May 1st in good faith, and could not have so made any interest payment after the proceedings for purchase were instituted by the city. It obviously advanced the interest at these times, particularly on May 1st, with a view of postponing the discovery by its customers, the bondholders, of its breach of faith with and duty

to them, in foisting upon them discredited and unsound securities, instead of the safe and interest-paying securities which it had been charged to procure with the funds left with it for investment. Under these circumstances it appears to me that there had in fact been a default of the Kaukauna Company in paying interest on the bonds in suit, although there had been none in form. The situation was such that the trustee would have been entirely justified on May 1, 1912, and at either interest-paying time in 1911, in exercising its option to declare the principal of the bonds due for default of payment of interest, which it had the authority to do under article VI of the trust deed."

There can be no question but that the trial court was right in holding that the trustee would have been justified in declaring the whole amount secured by the trust deed due, instead of advancing the funds for the payment of the amount due. But the trustee did not exercise this option; on the contrary, it advanced the money with which to pay the interest due. Certainly after such interest was paid there was no default, and there existed at no time before November 1, 1912, such a default as would authorize the trustee to act under the provisions of article VI. After the *Trust Company* had paid the interest it could not by any action on its part withdraw payment and create a default. It cannot be held that it was unlawful for the *Trust Company* to advance this money for the Kaukauna Company, although it may well be true, as the court found, that its main purpose in doing so was to conceal from its customers the true situation. Whatever might have been done, the interest was in fact paid. The conclusion reached by the trial court, therefore, that the *Trust Company* might have declared the whole of the bonds, principal and interest, due, and that it was therefore authorized to accept payment, does not follow. In any event, no sum would be due except the amount as to which there was a default until the trustee had in fact elected to declare the same due in accordance with the provisions of article VI.

The power therein was never exercised, and consequently the covenants contained in article VI did not operate and could not operate until such election was in fact made.

The payment to the trustee not being authorized by the terms of the trust deed, it is clear that it had no authority to receive payment for the bondholders merely because it was trustee. It is true that the coupons and bonds were payable at the office of the *Trust Company,* but they were so payable only when due. The fact that the bonds and interest coupons were made payable at the office of the *Trust Company* did not make the *Trust Company* the agent of the bondholders to receive payment. Money deposited with the *Trust Company* for that reason remained the property of the payor, and if lost it was the loss of the payor. *Bartel v. Brown,* 104 Wis. 493, 80 N. W. 801.

It is the established law of this state that payment of a negotiable instrument must be made to the party having possession of the same or to some person duly authorized by the payee to accept payment, and that where the person to whom payment is made is not in possession of the negotiable instrument the burden is upon the party making the payment to show the agent's authority by clear and satisfactory evidence. *Bartel v. Brown, supra; Spence v. Pieper,* 107 Wis. 453, 83 N. W. 660; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 844; *Drake v. Drake,* 142 Wis. 602, 126 N. W. 19.

The authority of the trustee to act for the bondholders is prescribed and limited by the terms of the trust deed, and a payment to the trustee merely as trustee cannot be held to be payment to the bondholders, unless made when and as prescribed by the terms of the deed. *Miller v. Mitchell,* 58 W. Va. 431, 52 S. E. 478; *Kransz v. Uedelhofen,* 193 Ill. 477, 62 N. E. 239; *Fortune v. Stockton,* 182 Ill. 454, 55 N. E. 367; *Schroeder v. Wolf,* 227 Ill. 133, 81 N. E. 13.

It appears without dispute that the city, through its offi-

cers who had charge of the matter, not only had constructive notice afforded by the record, but had actual notice of the terms and conditions of the trust deed. It is the established law of this state that the lien of a mortgage extends to the award. *Stamnes v. M. & S. L. R. Co.* 131 Wis. 85, 109 N. W. 100, 925, 111 N. W. 62. Such being the case, it was clearly the duty of the city to see that the amount of the award, which was admittedly less than the amount of bonds outstanding, was applied in some manner to the satisfaction of the claims of the bondholders. It might have accomplished this purpose in one of two ways: (1) By payment of the money into court for distribution. (2) By securing consent of the bondholders, or, in the event that they would not consent to accept payment, waiting until they asserted their rights in the fund. The city could not discharge its obligation in this respect by turning over the amount of the award to the insolvent Kaukauna Company to be disposed of at the direction of the Pereles firm.

At this point, as elsewhere during the course of the proceedings, the Pereles interests took the case in hand in their own behalf and in disregard of their duty to the city as well as to their clients. It appears, however, without dispute that the entire amount of $45,294.40 was paid to the *Trust Company* by the Kaukauna Company. It also appears that the Pereles brothers, either personally or as managing officers of the *Trust Company,* represented certain of the bondholders as their general agents for investment purposes, with power to accept payment on outstanding securities, to substitute one security for another, and generally to control the investment of the funds of such clients, and, in some cases at least, had the bonds of their clients in their possession. Therefore when this fund reached the hands of the *Trust Company* it was as to some bondholders in the hands of a general agent, authorized, not by the terms of the trust deed, but by the direction of these bondholders, to deal generally with their

securities and to accept payment, and we must hold that in such cases payment was made.

As to those bondholders who had not constituted the *Trust Company* or the Pereles interests their general agents for the purpose of dealing with their funds and securities and who retained possession of their own securities and managed and controlled them themselves, it is clear that the fund was not in the hands of one authorized to receive payment, and consequently as to such bondholders there was no payment.

The trust deed was for the *pro rata* benefit of all of the bondholders, and upon the making of the award and the ascertainment of the first lien thereon—now established by decree of the court—each bondholder became entitled to receive his *pro rata* share thereof. The court did not find the facts relating to the authority of the *Trust Company* to represent the several bondholders. Further proceedings in that respect are therefore necessary. Neither does it definitely appear to what bondholders the $15,500 was paid.

The trial court held that the trustee was restricted from pursuing any other remedy than that "of impressing said purchase money with the lien of the trust deed." If payment to the *Trust Company* was not a sufficient impressment, it is difficult to understand how the *Trust Company* could impress funds in its own hands. The holding in effect amounts to this: that the plaintiff trustee has no other remedy than to pursue the funds in the hands of the *Trust Company*. This proposition rests primarily upon the conclusion that the *Trust Company* was authorized to accept payment. The *Trust Company* not being so authorized, the conclusion of course does not follow.

It appears that the plaintiff trustee demanded payment to him of the amount remaining in the hands of a third party after the satisfaction of the first lien, being the $2,084.85 hereinbefore referred to. In making this demand the trustee was acting under the trust deed, having been duly authorized

to so act in accordance with its terms. He had a perfect right to demand and receive the sum due, and, if it amounted to a ratification of the sale to the city, it amounted to no more than acquiescing in the result of a proceeding by which he was already bound. It cannot therefore be held to be an election of remedies nor a waiver of any other rights which he might assert as the representative of the bondholders, whose claim to the award has not been satisfied.

It was further held that the plaintiff trustee was barred by laches and estopped from claiming a foreclosure of the trust deed by reason of the acquiescence of the bondholders in the position of the city and permitting the city without objection or notice of adverse claim to expend a large amount in betterments after November 1, 1912, when the bondholders had notice of the facts by reason of the default in the payment of interest.

In our view of the case there was no estoppel or waiver. The amount of the award in this case was paid some months before there was any default in the payment of interest and at a time when the bondholders had no actual notice of the proceedings. The bondholders had a right to stand upon the terms of the trust deed, and could not be required to accept the amount of the award except in accordance with its terms, unless and until they chose to do so, and it was the duty of the city to preserve the fund until that time for their benefit or to pay it into court.

The bondholders not represented by the Pereles firm or the *Trust Company* are entitled to a foreclosure decree, unless their claims as determined in this action shall be paid by the city. The city being charged with the duty of seeing that the *pro rata* amount of the award was applied to the extinguishment of their claims, and having failed in that duty, and their claims not having been so extinguished, the property may be charged equitably with its payment, the amount, however, being limited to their *pro rata* share of the award.

While there are authorities holding that a payment of an award in condemnation proceedings to the mortgagor is sufficient, we do not think such holding is based upon sound reasoning. Here the bondholders were in fact the equitable owners of the property to the full amount of the award, and to hold that their claims can be discharged by turning over the amount of the award to an insolvent mortgagor or to a trustee not authorized to receive payment, seems to us contrary to the plainest principles of law and justice. An obligation to one person cannot be discharged by a payment to a third person not authorized to receive payment. Neither are there any grounds upon which the bondholders or the plaintiff trustee can be held to be estopped to assert the right of those bondholders not represented by the Pereles firm or the *Trust Company*. The city has never changed its position one iota since November 1, 1912, when there was a default in the payment of the interest on the bonds, or since a time when the bondholders had actual notice of the proceedings. In order to constitute estoppel or waiver the party claiming the benefit thereof must in some way have altered his position for the worse relying upon the conduct of the opposite party. That element of estoppel or waiver is entirely lacking in this case. Although it had notice, actual and constructive, of the trust deed and its terms, the city chose to proceed without regard thereto; no doubt relying, as many others did, upon the responsibility and character of the Pereles firm. However, having trusted them with the property of others, in violation of its duty, it certainly is not in a position to claim that those who did not trust them should bear the loss.

We therefore conclude (1) that the proceedings by which the city acquired title to the property are valid; (2) that the interest of the bondholders was limited to the amount of the award made by the commission as affirmed by the circuit court, less the amount of the first lien for rentals; (3) that the *Trust Company* or the Pereles firm were general agents of some of the bondholders with authority to accept payment

of their bonds, and that as to such bondholders a payment to the *Trust Company* was a payment of their share of the award, to the extent of their *pro rata* share of the sum paid; (4) that as to those bondholders who had not authorized the *Trust Company* or the Pereles firm to represent them, the *Trust Company* had no authority to accept payment and the payment to the *Trust Company* did not affect the right of such bondholders to their *pro rata* share of the award; (5) that all bondholders are entitled to their *pro rata* share of the $2,084.85, except those, if any there are, to whom their full *pro rata* share has been paid; (6) that there should be an accounting and judgment of the trial court determining what bondholders were represented by the Pereles firm or the *Trust Company* as general agents, and what bondholders were not so represented, and establishing the amounts due the several bondholders in accordance with this opinion; (7) that when the facts are so ascertained the city be given a reasonable time within which to liquidate the claims of the bondholders so established; (8) that in the event of the failure of the city to liquidate the claims of bondholders within the time fixed, a foreclosure be had as demanded in the complaint; (9) that the bondholders are entitled to personal judgment against the Kaukauna Company for any amount remaining unpaid after application of the amount of the award as herein directed.

By the Court.—Judgment reversed, and cause remanded for further proceedings in accordance with this opinion.

ESCHWEILER, J., took no part.

The respondent *City of Kaukauna* moved for a rehearing. The following opinion was filed January 16, 1917:

ROSENBERRY, J. It is suggested that the third provision of the mandate, when taken in connection with the statements made in the body of the opinion, is ambiguous. It

was not intended to adjudicate that the Pereles brothers or the *Trust Company* had authority from any particular bondholder to receive his share of the award, but only to state that the proofs in the record indicate that the Pereles brothers or the *Trust Company* as to some of the bondholders may have had such authority and as to others it did not have such authority, leaving the entire question open for determination by the trial court in accordance with the opinion of this court.

By the Court.—Motion for rehearing denied, with $25 costs.

MILWAUKEE STRUCTURAL STEEL COMPANY and others, Respondents, vs. BORUN and another, imp., Appellants, and others, Respondents.

October 5, 1916—January 16, 1917.

Estoppel in pais: *Mechanics' liens: Enforcement: Equity: Parties: What matters may be adjudicated: Priority of liens over mortgage: Personal liability.*

1. If a person, in a business transaction, makes representations or assumes a position for the purpose of inducing another to act in reliance thereon, knowing or having reasonable ground to know that he will do so, and such is the result, so that in case of such person being permitted to act contrary to such representations, or to take a position inconsistent with that relied on, damage would result to such other, such person will be barred from having any benefit of such contrary action or inconsistent position to such other's loss.
2. An action to enforce a mechanic's lien, though statutory, is equitable in its nature, and all persons having or claiming to have interests germane to the primary rights involved may properly be made parties, and the whole matter adjudicated as in an ordinary equitable action.
3. In such an action the court is not confined to the precise relief asked for in the complaint, but may give such further relief as the facts established by the evidence require in order to do full

justice, including a personal judgment against all parties who became liable with the primary debtor for payment of the lien claims.

4. Where the vendors of land had taken back a purchase-money mortgage and had induced the furnishing of labor and materials for the erection of a building on the land by promising to advance the necessary money to the owner and representing that the mortgage interest would be subject to the rights of the persons furnishing such labor and materials, a judgment giving the liens of such persons priority over the mortgage was justified under the doctrine of estoppel *in pais*.

5. But in the absence of any promise by said vendors, either to the owner or to the lien claimants, to pay the indebtedness incurred in erecting the building, a personal judgment against the vendors in the lien action was not warranted.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed in part.*

The action was to enforce a mechanic's lien on property in the city of Milwaukee, Wisconsin.

Plaintiff and defendants *Hopp* and *Green* were contractors and materialmen. The proprietor was defendant Goulden. Defendant *Samuel Borun* had a $25,000 mortgage on the property claimed to represent purchase money. Defendant *David J. Borun* contracted to furnish $25,000 to be used for construction purposes and had an unrecorded mortgage for that amount on the realty. In due course, the Merchants & Manufacturers Bank became receiver. The purpose of the action, as to *Samuel Borun,* was to set aside his mortgage on the ground of fraud, so far as otherwise it would take precedence of the liens, and to make the liens take precedence of all interests of the *Boruns* and all other interests except a mortgage lien of $3,500. The lienors succeeded accordingly, and as hereafter stated. The mortgagees appealed.

Upon the argument, counsel for appellants announced that they would abide by the findings and contest only the conclusions of law, adverse to their mortgage interest. Such

findings, so far as necessary to be considered, are, in substance, as follows:

1. On, and for some time prior to, November 17, 1914, defendants *Borun* were copartners in real-estate business, the management being by *David J. Borun,* who conducted all transactions of the firm with the proprietor and plaintiff *F. W. Andree,* with the knowledge of his copartner.

2. On the day mentioned, the *Boruns* were owners of the land upon which the building was constructed, the fair market value of which, at the time particularly mentioned, was $13,000. On such day they sold the same to defendant Goulden, taking back, in the name of *Samuel Borun,* the mortgage hereafter mentioned, which was duly recorded.

3. They represented to said *Andree* that a mortgage of $3,500 on the property would be paid; that *David J. Borun* would loan $25,000 for use in constructing a building to be erected on the land; that the estimated excess of the cost, $6,000, would be paid by one of them and that the recorded mortgage of $25,000 was the source from which *David J. Borun* would obtain the money to advance for construction purposes.

4. January 6, 1915, Goulden contracted with *Andree* for the latter to prepare contracts for, and to superintend the erection of, the proposed building, his compensation to be the difference between the estimated and actual cost of the building, which was $1,313.

5. Pursuant thereto, January 14, 1915, contracts were entered into with various persons, including the particular lien claimants, who fully performed their respective agreements.

6. *Andree* and such claimants were induced to do as they did by the representations made as aforesaid.

7. Defendant *Samuel Borun* had notice of all the matters aforementioned and consented thereto, and had knowledge of the commencement of operations by tearing down an old building on the premises and making the excavation for the

new one, and of all operations thereafter until the building was completed, and acquiesced therein.

8. The plans for the building were approved by *David J. Borun* and all changes during the period of construction were directed by him.

9. The *Samuel Borun* mortgage and note are held by the defendant bank under an order of the circuit court of July 9, 1915. The interest represented by said mortgage, and all interests in the property of either of the *Boruns* or defendant Goulden, are subject to the lien claims of plaintiff and defendants *Hopp, Green,* and others, which claims take precedence of all interests therein except the mortgage lien of $3,500.

10. Defendant Goulden and defendants *Borun* should be charged with any deficiency in realizing the liens out of the property, not exceeding $31,000, with interest from June 15, 1915, at the rate of six per cent. to date of payment.

Said defendants should be adjudged to pay the lien claimants their costs and disbursements of this action, including the expense of filing the lien claims and of enforcing the judgment.

Judgment was entered accordingly.

For the appellants there were briefs by *Morris Stern,* attorney, and *A. W. Richter,* of counsel, and oral argument by *Mr. Richter.*

Paul D. Durant, for the respondents.

The following opinion was filed October 24, 1916:

MARSHALL, J. Counsel for all parties having announced, on the oral argument, that they would rely on the findings of fact in submitting for decision the question of whether the judgment complained of is right, we have only a very familiar principle of law to deal with, as we view the case.

The circuit judge did not expressly state, in the decision, the principle of law which was supposed to rule the case; but

it satisfactorily appears that the principle of estoppel *in pais* was supposed to govern, so far as the conclusion was reached that the lien claims should take precedence of any mortgage or other interest in the property of the *Boruns* or either of them.

What circumstances are essential to bind a person by estoppel *in pais,* regardless of what would otherwise be his rights, are too well understood to warrant any extended discussion. The rule may be thus stated: If a person, in a business transaction, makes representations or assumes a position for the purpose of inducing another to act in reliance thereon, knowing or having reasonable ground to know that he probably will do so, and such is the result, so that in case of such person being permitted to act contrary to such representations, or to take a position inconsistent with that relied on, damage would result to such other, such person, upon equitable principles, will be barred from having any benefit of such contrary action or inconsistent position to such other's loss.

There is no principle which is more valuable, than that stated, in the administration of justice. This court has said:

"It stays the operation of other rules which have not run their course, when to allow them to proceed further would be a greater wrong than to permanently enjoin them. It is a rule of justice which, in its proper field, has a power of mastery over all other rules. It is a rule by no means to be discredited, but, rather, one entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords." *Marling v. FitzGerald,* 138 Wis. 93, 120 N. W. 388.

The situations where that principle has been applied are very numerous. Citations of precedents would not be specially helpful. The real question is: Do the circumstances of this case fall within the principle? If so, it rules the matter.

The general effect of the findings of fact is that the proprietor of the property and the *Boruns,* for the purpose of inducing the lien claimants to furnish labor and material for the building, represented that the *Samuel Borun* mortgage stood for the interest in the property which would be devoted to paying therefor. That seems quite plain. That to otherwise use the proceeds of the mortgage, or treat the mortgage interest as superior to the rights of those who had relied upon such interest being used for their protection, in case they furnished such labor and material for the building, would be a damaging change of position within the principle of estoppel *in pais,* we regard as obvious and therefore will not prolong this opinion to further discuss the matter. The judgment, so far as it makes the interests in the property of the *Boruns* and those claiming under them subordinate to the lien claims, only gives judicial effect, for protection of respondents, to the representations made and position assumed by the *Boruns* which was the inducing cause of the lien claimants extending the credit to Goulden.

Counsel for appellants contend that the judgment against the *Boruns,* charging them as personally liable for the indebtedness to the lien claimants, is unwarranted because the scope of the complaint is confined to the subject of enforcing the lien claims and settling the priority between them and the mortgage interests. The scope of the complaint is thus limited; but, though the action is statutory, it is of an equitable nature. *Spruhen v. Stout,* 52 Wis. 517, 9 N. W. 277. Therefore all persons having, or claiming to have, interests germane to the primary rights involved could properly be made parties, and the entirety, including all the details, adjudicated, as in an ordinary equitable action. That justified charging all persons in the lien action with personal liability, whom the facts show became liable with the primary debtor for payment of the lien claim. *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 138 N. W. 102.

In such a case as this, the court is not confined to the precise relief asked for in the complaint but may give such further relief as the facts, established by the evidence, properly introduced, require in order to do full justice.

It is further contended that, in any event, the facts found do not justify the judgment, holding the mortgagees liable, personally, for the indebtedness to the lien claimants; and with that we are inclined to agree. It is not found that they promised to pay respondents or any other of the claimants for labor or material furnished in the construction of the building. They simply promised to furnish the necessary money to Goulden and assumed the position that the mortgage interest would be subject to the rights of the persons furnishing such labor and material. That was what they relied on, not any promise by the *Boruns* to them, directly or indirectly, to become their debtors, in any event. Such is the effect of the findings as we read them.

There was no promise to Goulden to pay his indebtedness to the lien claimants, should there be any, within the principle of *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, and similar cases. There, obviously, was no valid promise, nor a promise at all, by the *Boruns* to answer for the default of Goulden, as regards paying the indebtedness which he might incur in constructing the building. There was no writing,—nothing to answer the calls of sub. (2), sec. 2306, Stats., and no contractual relation between the parties creating the obligation of debtor and creditor.

We must conclude that the trial court assumed that the principle of estoppel justified the personal judgment. If so, it went too far. Such principle being grounded in equity, it is limited by the reason of it. That goes no further, under the circumstances of this case, than to justify treatment of the interests of the *Boruns* in the property as subsequent to the lien claims.

The result of the foregoing is that the judgment appealed from must be reversed, as regards personal liability of the

Boruns for the indebtedness of Goulden to the lien claimants, and otherwise affirmed, the costs in this court to be justly apportioned accordingly, taking into account the fact that the cause might well have been brought here on the record alone.

By the Court.—The judgment, as to personal liability of *David* and *Samuel Borun,* is reversed and it is otherwise affirmed. Costs in this court will be taxed in favor of appellants only for the clerk's fees, $25 attorneys' fees, and $25 for printing.

ESCHWEILER, J., took no part.

The following opinion was filed January 16, 1917:

PER CURIAM. There was a motion submitted on behalf of respondents for a rehearing and to amend the judgment and mandate, and also a motion submitted on behalf of appellants for a rehearing, though no brief on such motion was served. The briefs do not seem to present any question not fully considered before and covered in the opinion on file. It is considered that the result there indicated should be adhered to and the motions denied. Such result, it is thought, is plainly to the effect, as was intended, that the judgment below as to personal liability of the *Boruns* as to the $6,000, as well as the $25,000, is reversed. There should be no misunderstanding about that; the words, "the judgment as to personal liability of *David* and *Samuel Borun* is reversed," in connection with the logic of the opinion to the effect that there is no sound basis in the facts and law applicable thereto for any such liability, cannot be well made plainer. In order to facilitate the final closing of controversy between the parties both motions are denied. No costs will be allowed on either, but respondents will pay the clerk's fees.

MOUDRY, Respondent, vs. PATRICK CUDAHY FAMILY COMPANY, Appellant.

October 5, 1916—January 16, 1917.

Appeal from civil court before entry of judgment: Validation.

1. **Under sec. 28, ch. 549, Laws 1909, as amended by ch. 320, Laws 1913, an appeal from a judgment of the Milwaukee civil court to the circuit court cannot be taken before the judgment is entered.**
2. **Sec. 2836*a*, Stats., cannot be construed as validating an attempted appeal taken from a judgment before such judgment was entered.**

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Plaintiff secured a verdict of $308 in the civil court, which was trebled under sec. 3367, Stats., and the amount of defendant's counterclaim, $75 for rent, deducted therefrom and judgment entered for the balance and costs. On appeal the circuit court disallowed treble damages and entered judgment for $286.69.

The plaintiff moved in the circuit court to have the appeal dismissed for the reason that it was not properly taken. The motion was denied, and plaintiff on proper proceedings under the statute, sec. 3049*a*, asks this court to review that ruling.

For the appellant there were briefs by *Markham, Freeman & Cudahy,* attorneys, and *Henry J. Bendinger,* of counsel, and oral argument by *Mr. Bendinger.*

W. F. Thiel, for the respondent.

The following opinion was filed October 24, 1916:

KERWIN, J. Several errors are assigned and discussed in this case, but in the view we take of it it is only necessary to consider the motion made by the respondent in the circuit court to dismiss the appeal because not properly taken. It

appears without dispute that when the appeal was taken from the civil to the circuit court the judgment had not been entered nor the costs taxed. The Civil Court Act, sec. 28, ch. 549, Laws 1909, as amended by ch. 320, Laws 1913, provides that the appeal shall be taken within twenty days after entry of the judgment or order appealed from. It is conceded by counsel for appellant that independent of sec. 2836*a*, Stats., no appeal was taken, but it is claimed that this statute cures the defect in taking the appeal before entry of judgment. This statute provides that, in case it shall appear upon a hearing on a motion to dismiss an appeal that the appeal was attempted to be taken in good faith, the court shall have power in its discretion to allow any defect or omission in the notice, undertaking, or other appeal papers to be supplied, either with or without terms, and with the same effect as if the appeal had been originally properly taken. This statute plainly contemplates that there must be a judgment to appeal from at the time the defective appeal is taken, and the statute obviously is intended to cure defects in the appeal papers. But we think it is clear that the statute cannot be held to cover a case where no judgment had been rendered at the time the appeal was attempted to be taken. There was no right of appeal before entry of judgment given by statute. The statute expressly provides that the appeal shall be taken within twenty days "after entry of the judgment." To construe this statute so as to validate the present appeal would be simply to hold that the statute allows an appeal from a judgment before any judgment is entered. We are therefore of opinion that the motion to dismiss the appeal should have been granted.

By the Court.—The judgment of the court below is reversed, and the cause remanded with instructions to dismiss the appeal to the circuit court.

A motion for a rehearing was denied, with $25 costs, on January 16, 1917.

MUNIA, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

October 5, 1916—January 16, 1917.

Master and servant: Injury: Negligence of fellow-servants: Evidence: Weight and sufficiency.

1. In an action for personal injuries alleged to have been caused by negligence of fellow-servants in throwing or dropping one end of a heavy timber which plaintiff and three others were moving across a railroad track, it is *held* that no negligence was shown, all the evidence being consistent with the theory that the timber fell by accident.
2. Plaintiff's testimony in such case that the timber was thrown is not entitled to weight, he having admitted that he did not see it thrown, and that he was not looking, so that all he knew was that it dropped or fell from the hands of the men at the opposite end.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This action was brought in the civil court of Milwaukee county to recover for personal injuries. There was a verdict and judgment for plaintiff and the defendant appealed to the circuit court. On appeal to the circuit court the judgment of the civil court was affirmed.

The material evidence as set forth in the opinion of the trial judge is as follows:

"The plaintiff was the only witness who gave evidence as to the manner in which the accident occurred. The testimony shows that the plaintiff, with three other men, was moving oak timbers, which he called ties, from a position where they were piled beside the track, to a point upon the opposite side of the track. The evidence further shows that the ground was soft and sandy, and their feet sank some distance in the ground as they carried the ties. The testimony further shows that the ties were seventeen inches square and twelve feet long. The four men engaged in removing the ties had already moved two to the point where they intended to pile them. In removing the third tie the plaintiff testi-

fied that it was to be placed up on top of one of the ties previously placed; that just as the two men at the opposite end from him had reached the tie upon which it was to be placed, and just before the end carried by the plaintiff had reached a position above the tie upon which it was to be placed, the two men at the end of the tie let it drop upon the lower tie; that the jar of the dropping loosened the hold of the man who was with the plaintiff, throwing the entire weight upon plaintiff; that he was unable to hold it and it dropped and injured his foot. The evidence further shows that the drop from the position in which the men were carrying the tie to the one upon which it was to be placed, was eleven inches. . . .

"While the plaintiff in this action testified that the two men on the opposite end of the tie threw it down, the evidence clearly shows that he was unable to tell whether or not such is a fact. He testified that at the time the tie was dropped he was looking straight ahead; that he did not know what were the intentions of the men on the opposite end of the tie in dropping it. . . .

"It was practically impossible for him to say whether the tie slipped from their hands, and it was impossible for him to determine what was going on in their minds as to their intentions in throwing the tie down, and this can only be left as a matter of conjecture."

Edward M. Smart, for the appellant.

W. C. Seefeld, for the respondent.

The following opinion was filed October 24, 1916:

KERWIN, J. The facts as found by the trial judge are set out in the statement of the case and it is unnecessary to further repeat them in this opinion. The negligence alleged is the dropping or throwing of a timber, causing one end to fall on plaintiff's foot. It is conceded in the brief of counsel for respondent that the facts are fully set forth in the opinion of the trial court. We think it clear upon the undisputed evidence that this case is ruled by *Schmit v. Frederickson,* 160 Wis. 426, 150 N. W. 426. In that case two men were handling the timber, one at each end, and one man

dropped his end, which resulted in injury to plaintiff. In the instant case the timber was larger than that in the *Schmit Case* and two men were carrying each end when the men at the end opposite plaintiff dropped the timber and plaintiff was injured. In the instant case there is no evidence whatever that the men intentionally dropped or threw the timber, and all the evidence is consistent with the theory that it fell by accident from the hands of the parties carrying it without any negligence on their part. It is true in this case as in the *Schmit Case* plaintiff testified that the timber was thrown, but he admitted that he did not see it thrown, that he was not looking, hence all he knew about its being thrown was that it dropped or fell from the hands of the men at the opposite end.

Counsel for respondent relies upon *Meo v. C. & N. W. R. Co.* 138 Wis. 340, 120 N. W. 344. That case is clearly distinguishable from the instant case. In the *Meo Case* the rail was to be dropped upon signal given and the evidence was conflicting as to whether the rail was dropped before the customary signal had been given by the foreman. We think it clear that there was no evidence to support a verdict in favor of the plaintiff, therefore the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with instructions to dismiss the action.

A motion for a rehearing was denied, with $10 costs, on January 16, 1917.

ENGEL, Appellant, vs. T. L. SMITH COMPANY, Respondent.

October 6, 1916—January 16, 1917.

Master and servant: Injury to employee of subcontractor: Safety of working place: Possession and responsibility of principal contractor: Operations rendering place unsafe: Proximate cause: Changing findings of jury: Excessive damages for death.

1. In an action to recover for the death of an employee due to the fact that his working place was unsafe, if the defendant was in possession of and furnished the working place and it was unsafe at the start or was rendered so by defendant's operations while the work of the employee was in progress, the defendant cannot escape liability on the ground that the immediate employer of the decedent was an independent contractor.
2. Defendant contracted to furnish the material and machinery and construct a rock-crushing plant for a county, and to give the county ten days after its completion to try it and determine whether it satisfied the agreement. Afterwards defendant sublet to one R. the furnishing of certain material and the erection of the plant ready for use, defendant to have ten days after such erection to determine whether the subcontract had been satisfactorily performed. When R.'s contract was substantially completed, defendant's agent, with a committee of the county board and certain county employees, visited the plant to see whether it was ready for use, and if so to take charge of it. Upon starting certain machinery it was found that the hopper over the crusher was too low, and defendant's agent engaged R. to make the necessary changes therein as extra work. Two days later the county employees who were present at the first test, and who had received certain instructions from defendant's agent, visited the plant again and started the machinery, whereupon a guy cable slipped out of its clip, causing a mast to fall and fatally injure an employee of R. who was engaged in making the changes in the hopper. In an action for the death of such employee it is *held*, upon the evidence, that defendant took possession of the plant on the day the arrangement was made for the extra work; and it was therefore responsible for the safety of the working place of the deceased if, at the time of the accident, the machinery was being operated by its authority.
3. There being ample evidence to sustain findings by the jury that the working place of the deceased was not as safe as the nature of the employment would reasonably permit, that the machinery was started, at the time of the accident, by a county employee

by direction of defendant's agent, and that the agent had authority to give such direction, the trial court erred in changing the finding that the agent gave such direction and also in changing a finding that defendant's failure to furnish a safe working place was the proximate cause of the accident.

4. Damages for the death of a person should be limited to the measure of pecuniary benefits which the surviving relative could reasonably have expected to realize from a continuation of the life of the deceased.

5. For the death of an unmarried son, thirty years old, who earned $1.50 per day and gave all but enough to cover his reasonable necessities to support the family, an award of $4,800 to his widowed mother, aged fifty-three, who was in good health and earning money and who had four other sons, ranging in age from five to eighteen, contributing to the family support, is *held* excessive, and plaintiff is given an option to take judgment for $3,500 or submit to a new trial.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

Action to recover for the death of plaintiff's son, claimed to have been caused by negligence of defendant.

Defendant, March 15, 1913, contracted, in writing, to construct for and deliver to Racine county, Wisconsin, at its gravel pit, a complete rock-crushing plant, furnishing all material and machinery therefor, and to afford ten days' time after the completion thereof to try the apparatus and determine whether it satisfied the agreement; and to instruct the county's engineer how to operate the same.

Defendant contracted with one, Rewald, to unload the machinery and material from cars, provided by the former in performing its agreement with the county, to furnish certain other material for use in constructing a bin, hopper tower, hopper, mast, and the necessary buildings for, and to erect the plant, ready for use, in all respects according to such agreement, and to afford defendant ten days' time after such erection, to test the plant for the purpose of determining whether the subcontract had been satisfactorily performed.

In all transactions aforesaid, and in respect to performance of the contracts, defendant was represented by one, Marker,

who prepared the plans and specifications for the work. When Rewald had executed his contract, except as to some small matters, Marker, with a committee of the county board, and three employees of the county, Heidermann, Winsall, and Bettzig, visited the plant for the purpose of seeing whether it was ready for use, and, if so, taking charge of it. The county board was anxious to put the plant to use as soon as practicable, and so, by its representatives, acted with defendant, represented by Marker, in starting that part of the machinery, designed to convey gravel from the gravel pit to the hopper over the crusher. There was a seventy-foot mast fastened in place by guy cables, anchored in the ground at the lower ends and fastened to the top of the mast at the upper ends by such ends being passed around a cap or through eyes and doubled back and embraced by clips. One guy was opposite a track cable, extending from the top of the mast over, and some distance above, the hopper, to the gravel pit and there anchored. The particular guy was designed to bear the strain caused by moving the bucket loaded with gravel on the track cable from the pit to a dumping point over the hopper. The hopper was located within reach of the mast in case of its falling that way. The bucket was suspended from a carriage which traveled on the track cable. The carriage, with the bucket, mentioned in the verdict as an "excavator," attached thereto, was designed to be moved from the gravel pit to the dumping point over the hopper on a track cable, by means of an operating cable, called in the verdict a "drag line," attached to the bucket and extending to and over a pulley near the top of the mast, then down to and connected with a drum, located near the foot of the mast. The drum, by appropriate connections with motive power, was designed to be operated by an attendant, as desired, by manipulation of connecting levers. It was necessary to have what was called a trip button attached to the track cable at the proper point to cause the bucket to empty its load into the hopper upon reaching such point. The visit to the plant above mentioned was two days

before the accident. Some finishing work was then being done by Rewald, but his contract was substantially completed. He had not formally turned the plant over to be tested. It was necessary to complete the job for operation to properly place the trip button. Whether it was placed at all at this time was disputed on the trial. If then attached, it was some distance from the hopper location and near the gravel pit. The machinery was started to see how the bucket would perform from the gravel pit to the proper dumping point. At the first movement it was discovered that the hopper was too low. No attempt was made to run the bucket to the dumping point. Upon making such discovery, operations were stopped. Marker then engaged Rewald to make the necessary changes in the hopper, as extra work. That consisted of changing its location, somewhat, and building it much higher. Two days thereafter, a second visit was made to the plant by Heidermann, Winsall, and Bettzig, representing the county. Heidermann claimed that on the previous occasion, Marker directed him to place the button and see that everything was ready for a test. Henry Engel, at the time of the second visit, as an employee of Rewald and by his direction, was working on top of the hopper, engaged in doing the work ordered, two days before. In the afternoon, Heidermann caused the button to be placed, and the machinery to be started up. The bucket had been moved on the track cable, empty, in the morning. On the particular occasion it was loaded. The button was placed by Bettzig and another, by Heidermann's direction. The latter directed all operations. Bettzig was placed so as to give appropriate signals to Winsall, who was directed to operate the hoisting device. During the first movement of the bucket, the guy opposite the track cable slipped out of its clips, causing the mast to fall toward Engel's working place and to strike and fatally injure him.

There was evidence establishing, or tending to establish, the matters mentioned; also that the guy cable was negligently secured, in that it was fastened by two clips while the specifications called for four, and more than two were required, and that the machinery was not properly cperated.

The case was submitted to the jury for a special verdict which covered the issues made by the pleadings, so far as requested by the parties. Such other issues as there were, the trial court determined.

The jury found:

1. Defendant did not furnish deceased a place of employment as safe as the nature of the employment would reasonably permit.

2. Such failure was a proximate cause of the accident.

3. Marker directed Heidermann to run the drag-line excavator on the day of the accident.

4. Marker had authority to give such directions.

5. Defendant was guilty of negligence in constructing the plant.

6. Such negligence was a proximate cause of Engel's death.

7. Winsall was not guilty of any negligence in operating the hoisting apparatus.

8. It will require $4,800 to compensate plaintiff for her loss, occasioned by Engel's death.

Plaintiff's counsel moved for judgment on the verdict, which was denied. On motion of counsel for defendant, findings 2, 3, 5, 6, and 7 were reversed, leaving the verdict to stand, aside from the matter of damages, as follows: (1) Defendant did not furnish deceased a place of employment as safe as the nature of the employment would reasonably permit. (2) Such failure was not a proximate cause of the accident. (3) Marker did not direct Heidermann to run the drag-line excavator on the day of the accident.

(4) Marker had authority to give such direction. (5) Defendant was not guilty of negligence in constructing the plant. (6) Negligence on the part of defendant in constructing the plant was not the proximate cause of Engel's death. (7) Winsall was guilty of negligence in operating the hoisting apparatus.

On the verdict as so changed, judgment was rendered in favor of the defendant, the court deciding, in an opinion filed as a basis for the order changing the verdict, that Rewald was an independent contractor; that at the time of the accident the plant had not been turned over by Rewald; that the instructions given by Marker to Heidermann did not authorize him to start the engine or run the plant; that he only told him to fix the button and have everything in readiness; that Bettzig and Winsall were not employees of defendant; that what Marker meant, in his talk with Heidermann, was that when the button was fixed and hopper completed, the defendant would test the plant and, if found satisfactory, accept it of Rewald; that the contract with Rewald relieved defendant from all interference until it accepted the plant from him.

For the appellant there were briefs by *Tibbs, Foster & Schroeder,* attorneys, and *Daniel W. Sullivan,* of counsel, and oral argument by *Mr. William L. Tibbs* and *Mr. Sullivan.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *Arthur W. Fairchild.*

The following opinion was filed October 24, 1916:

MARSHALL, J. Errors are assigned on behalf of appellant because the court decided that the rock-crushing plant was in possession of Rewald at the time Engel was furnished his working place and at the time of the accident, and because answers given the jury were changed from being in favor of appellant so as to favor respondent.

The first four findings as made by the jury entitled appellant to recover. In submitting the question as to whether respondent furnished Engel a place of employment as safe as the nature of the employment would reasonably permit, and instructing in respect thereto, as was done, that if the guy cable was negligently fastened to the mast, such question should be answered in the negative, and not submitting any question on the precise point of whether respondent was in possession of the plant when the working place was furnished, obviously, it was held that there was no question, on the evidence, but that such possession existed and respondent was responsible for the safety of such working place. It is significant that the answer to the first question was not changed. So the verdict as corrected to harmonize with the views of the court, on its face, is to the effect that respondent did not perform its duty of furnishing Engel a suitable working place. So the court must have held, in the end, that the question was immaterial because the plant was not in possession of respondent when the working place was furnished or when the accident occurred. If it were in such possession, and furnished such place, and the place was not safe, within the rule of the statute, at the start, or was rendered so by its operations, while the work was in progress, it cannot escape liability upon the ground that the immediate employer of Engel was an independent contractor. *Jacobs v. Hershey L. Co.* 124 Wis. 54, 102 N. W. 319, and similar cases relied upon by counsel for respondent, do not apply to such a situation, as they clearly show.

Whether an immediate employer is a mere agent or an independent contractor, under the rule in question, is not always free from difficulty. The question is one of law where the facts are clear. It is unnecessary to point out here, if that could safely be done, the precise scope of the rule. It is sufficient to say that it does not include a situation such as

existed in this case, if respondent was in possession of the working place when it was furnished, and it was then unsafe, or was subsequently rendered so by respondent's operations.

The final decision, as to possession of the plant, as counsel for respondent contends, must, under the statute, have all the force of a jury finding, since it is a matter which was not submitted to the jury, and there was no request in that regard. However, its dignity is somewhat lessened from that which it would otherwise possess because of the fact that, when the case was submitted, the evidence was fresh in mind, and the court's attention was specially directed to the matter by an objection on behalf of respondent to submission of the first question, the conclusion was reached that the evidence so clearly showed possession of the plant in respondent as not to leave any issue in respect thereto for the jury.

In our judgment, from the record, the trial court was clearly right at first and clearly wrong in the end. It seems that the judge must have overlooked the fact that Marker, who represented respondent, at no time testified that the latter did not take possession of the plant on the day he visited it and discovered that a change in the hopper was necessary; and confused the matter of possession by respondent with that of possession by Racine county. Marker testified, positively, that the plant had not been turned over to the county at the time of the accident but not that it had not been turned over to respondent.

Much is made on behalf of respondent of the fact that there were some trifling details of Rewald's contract which were not completed at the time in question, and that the trip button was not in place until that was done by Heidermann, on the day of the accident. Who was to locate the trip button was dealt with on the argument as if that was a vital matter, but it seems otherwise. It was the merest kind of a detail which any one could attend to in a few moments, and Marker testified that "To place this button in position would be our

duty, of course, to get the plant in complete operation, and not the duty of Rewald." The evidence is very definite to the effect that there was nothing of consequence for Rewald to do when Marker, with a committee of the county board, and the employees of the county, visited the plant two days before the accident. Marker testified that everything but changing the hopper had been done. That is, that the contract made with Rewald to construct the plant was substantially completed when he was engaged to do the extra work of changing the hopper.

We will not spend time to discuss the evidence at length. It satisfies us that respondent, by its agent, Marker, took possession of the plant on the day the arrangement was made for the extra work and would then have turned the property over to the county had it not developed that the plan for the hopper was defective. Therefore, in employing Rewald to change the hopper, and while that was being done, operating the drag-line excavator, respondent was responsible for safety of the working place in question. That it was not as safe as the nature of the employment would reasonably permit, there was ample evidence. That being the case, the court clearly erred in changing the answer to the question as to whether the failure to furnish a suitable working place was a proximate cause of the deceased's injury and death, unless Heidermann was a mere interloper, instead of an agent of respondent by authority of Marker, in operating the drag-line excavator. That such authority existed was found by the jury, upon ample evidence, and the answer was not disturbed.

So the case really comes down to whether the court was clearly wrong in holding that there was no evidence tending to prove that Marker directed Heidermann to run the drag-line elevator. In our judgment that must be answered in favor of appellant. As we have said, Marker testified that it was respondent's business to place the button in proper position on the track cable. Heidermann testified that Marker

instructed him to do it and see that everything was ready for a final test. That was corroborated by Bettzig and was not really denied by Marker. The evidence, as a whole, convinces us that there was ample tending to show that, after Marker set Rewald and his employees to work to change the hopper, he left the plant in charge of Heidermann to look after it and do, or have done, whatever was necessary to get everything in shape for a final test and delivery of possession to the county, and, therefore, the finding of the jury on that subject should not have been changed.

It follows that appellant was entitled to recover on the verdict as rendered, but we are of the opinion that the damages assessed are far too large. That matter was not passed upon by the trial court. It was not necessary to do so; but, in sending the case back for further proceedings, it is considered that such matter should be dealt with.

The damages in such a case as this should be limited to the measure of pecuniary benefits which the surviving relative could reasonably have expected to realize from a continuation of the life of the deceased. That rule is too well understood to require citation of authority in respect to it, though it is not always kept in mind and the jury carefully instructed in regard thereto. The jury were quite fully instructed in this case, but do not seem to have comprehended that plaintiff's recovery should be limited as indicated, and the finding be based on evidence sustaining it to a reasonable certainty.

The deceased was thirty years old when killed. Plaintiff's husband survived him one year. Deceased was unmarried. Plaintiff was about fifty-three at the time of the accident. She is in good health and capable of, and does, earn money to, in part, support herself and family. She has four children, all sons, ranging from five to eighteen years of age. So far as their ages will permit, they show good disposition and capacity to aid her. The deceased earned $1.50 per day and all, except sufficient to cover his reasonable necessities, cus-

tomarily went for support of the family. The amount found by the jury would be equivalent to an annuity of about $225 per year during appellant's expectancy of life. That she could not reasonably have expected that measure of support from her son, seems very clear.

In the judgment of the court, the recovery should be reduced to $3,500 and that such sum will satisfy the rule that, in disturbing a verdict upon the ground of its being excessive, by requiring the plaintiff to take a less sum, or submit to a new trial, the amount named should be as small as an unprejudiced jury on the evidence, when properly instructed, would probably find. For myself, I am permitted to say, in this opinion, that such rule, in my judgment, requires the sum named here to be considerably lower than $3,500, but it is a matter in respect to which there may, easily, be differences of opinion.

By the Court.—The judgment is reversed, and the cause remanded with instructions to restore the answers made by the jury to the second, and third, questions, and to render judgment in favor of plaintiff for $3,500, and costs, if she elects to accept such recovery within thirty days after a return of the record to the court below, otherwise that there be a new trial.

A motion for a rehearing was denied, with $25 costs, on January 16, 1917.

FRIEDRICH, Appellant, vs. BOULTON, Respondent.

October 6, 1916—January 16, 1917.

Negligence: Personal injury: Contributory negligence: Questions for jury: Automobiles: Collision with bicycle: Law of the road.

1. Where the evidence in a personal injury action for negligence is conflicting, or where the inferences to be drawn therefrom are doubtful and uncertain, the questions of negligence are for the jury.
2. A nonsuit in an action for a personal injury on the ground of negligence is only proper when there is an entire want of evidence tending to show that defendant was negligent or when the evidence conclusively shows that the plaintiff's negligence contributed to produce the injury.
3. In an action for injuries sustained in a collision between plaintiff's bicycle and defendant's automobile, the questions of defendant's negligence and plaintiff's contributory negligence are *held* to have been for the jury.
4. In such a case plaintiff cannot be said, as a matter of law, to have been negligent in riding his bicycle on a path eleven feet from the right-hand curb, if the other parts of the street afforded ample space for all other vehicles and travelers to use the street without colliding with him, although a city ordinance required that he "keep to the right and as near the right-hand curb as possible."

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action is brought by the plaintiff to recover damages for personal injuries sustained by him because of a collision with defendant's automobile.

The Sixth-street viaduct in the city of Milwaukee runs north and south over the Menomonee river. The draw over the river consists of a north and south lift. Two sets of street-car tracks, used by the Chicago & Milwaukee Electric Railroad, run across this viaduct. The distance between the two center rails is six feet and two inches; the distance between the rails of each set of tracks is four feet and ten

inches; and the distance between the outer rails and the curb is eleven feet and one inch. The entire width of the viaduct is therefore thirty-eight feet.

On or about October 11, 1912, the plaintiff was riding a bicycle going north on the viaduct and the defendant was driving a roadster automobile going south on the viaduct. Both were approaching the north line of the north lift when they collided and the plaintiff was injured. The only testimony as to what happened at the time of the accident or immediately prior thereto is that of the parties themselves, and it is in sharp conflict. Plaintiff testifies in effect that he was riding a foot or two east of the easterly rail going north; that there were two coal wagons closely following one another going south on the west side of the viaduct on the west tracks; that when plaintiff reached a position about opposite from the most southernmost coal wagon the defendant shot out from the rear of the northerly coal wagon and crashed into the plaintiff; that when the automobile was stopped it was straddling the most easterly rail of the easterly tracks. The defendant testifies in effect that he was going south on the viaduct and on the west side of the same; that he turned toward the center of the viaduct to pass the two coal wagons. Defendant locates the coal wagons differently from plaintiff, as can be seen from the accompanying diagram. He testifies that he first observed plaintiff when plaintiff was west of the westerly car track and that plaintiff then crossed over the west tracks wobbling considerably and came up the center of the track in an undecided manner and shot over in front of defendant in an attempt to pass between the defendant and the northerly coal wagon; that he (defendant) was practically at a standstill at the time of the accident; that the westerly rear wheel of the automobile was east of and not quite up to the east rail of the west tracks; that there was room for the south-bound street car on the west tracks to pass with about a foot to spare, and that the car extends over the tracks about

a foot. The bridge tender and the motorman of the passing street car corroborate plaintiff's testimony as to the position of the automobile after the accident.

The diagram is inserted to aid in understanding the effect of the testimony of the plaintiff and defendant.

KEY TO SKETCH.

L–M	South-bound car tracks.
N–O	North-bound car tracks.
B & D	Coal wagons as located by defendant.
R & S	Coal wagons as located by plaintiff.
T–T–T	Plaintiff's course as described by himself.
Y	Point of collision as described by plaintiff.
F	Point of collision as described by defendant.
Y–Z	Defendant's course as described by plaintiff.
G–H–I	Plaintiff's course as described by defendant.
F–J–K	Defendant's course as described by himself.

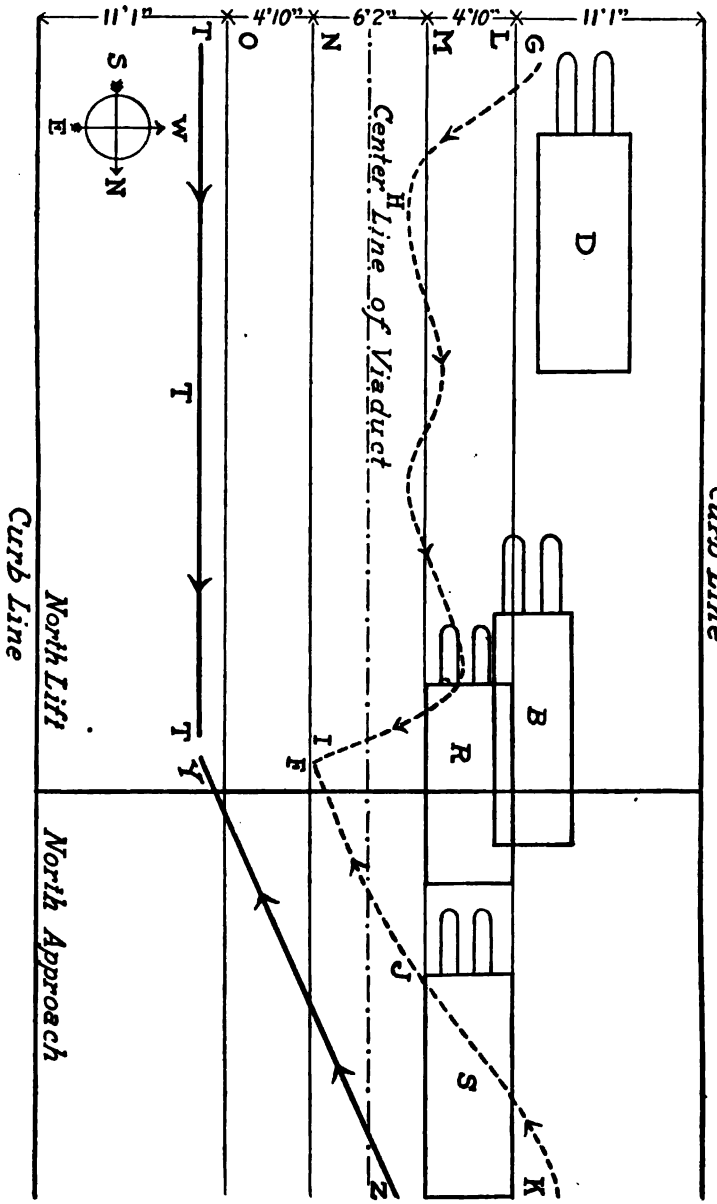
At the close of the plaintiff's case the defendant moved for a nonsuit. The court granted a judgment of nonsuit on the ground that the evidence showed as matter of law that plaintiff was guilty of contributory negligence. From such judgment this appeal is taken.

For the appellant the cause was submitted on the brief of *Lorenz & Lorenz.*

For the respondent there was a brief by *Doerfler, Green & Bender,* and oral argument by *T. H. Sanderson.*

The following opinion was filed October 24, 1916:

SIEBECKER, J. The trial court held that the evidence showed as matter of law that the plaintiff was guilty of contributory negligence. It is well established that if the evidence in a personal injury action for negligence is conflicting, or if not, if the inferences to be drawn therefrom are doubtful and uncertain, then the questions of negligence are for a jury. The plaintiff is also entitled to the benefit of every fact reasonably inferable from the evidence. The burden of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North Lift
Curb Line
North Approach

proving negligence in such cases rests on the defendant. *Clary v. C., M. & St. P. R. Co.* 141 Wis. 411, 123 N. W. 649. A nonsuit in an action to recover damages for a personal injury on the ground of negligence is only proper when there is an entire want of evidence tending to show that defendant was negligent or when the evidence conclusively shows that the plaintiff's negligence contributed to produce the injury.

A study of the record before us fails to sustain the trial court's conclusion that the evidence conclusively shows that the plaintiff was guilty of contributory negligence. The evidence of the parties is in sharp conflict on nearly all the evidentiary facts bearing on the question of plaintiff's position on the street, the course he took in riding his bicycle northward, the speed he traveled, the distance he was from the defendant when first he observed defendant coming from behind the coal wagon, the location of the coal wagons, and other detailed facts pertinent to the inquiries whether or not plaintiff and defendant were guilty of negligence and whether such conduct had any proximate causal relation to the collision. The foregoing statement in connection with the accompanying diagram shows that this evidence of the parties and other witnesses on these points was in irreconcilable conflict. Upon the statements and inferences most favorable to plaintiff under the evidence adduced the jury would have been justified in finding that plaintiff was riding on his bicycle on a path east of the most easterly street-car track along the line T–T about eleven feet from the easterly curb of the street, and when at the point Y the defendant suddenly "shot" from behind the coal wagon, S, with his automobile, and ran directly into plaintiff at the point T–Y and injured him. Plaintiff's description of the whole transaction also permits of the inference that he had neither time nor opportunity to meet this sudden emergency and avoid the defendant's car. It was also a jury question whether or not plaint-

iff was negligent in riding on the path he did in view of the conditions of the street, the other vehicles that were going over the viaduct at this time, and the requirements of the ordinance that he "keep to the right and as near the right-hand curb as possible." It cannot be said that the plaintiff was conclusively negligent in riding on a path about eleven feet from the right-hand curb if his claim that the other parts of the street afforded ample space to all other vehicles and travelers to use the street without colliding with him is found to be true. It is also evident, if his version of the affair is correct, that defendant had ample space to drive his car safely between plaintiff and the coal wagons and that defendant unnecessarily took the course which inevitably led him into collision with plaintiff where he states he was riding. There is also a conflict in the evidence as to the speed defendant and plaintiff were traveling from the time each one could have observed the other. The inference to be drawn from the evidence on this point is uncertain and doubtful and clearly within the province of a jury. Upon all the evidentiary facts and circumstances the questions of defendant's negligence and plaintiff's contributory negligence are clearly for determination by a jury, and the trial court erred in awarding a nonsuit.

By the Court.—The judgment of nonsuit is reversed, and the cause is remanded to the circuit court for a new trial.

A motion for a rehearing was denied, with $25 costs, on January 16, 1917.

SUTTER, Administrator, Appellant, vs. MILWAUKEE BOARD OF FIRE UNDERWRITERS, Respondent.

October 24, 1916—January 16, 1917.

Municipal corporations: Ordinances: Granting right of way on streets to fire patrol: Police power.

1. **Although a board of fire underwriters organized, among other purposes, to maintain a fire patrol is not a municipal corporation, yet such patrol, which under legislative authority assists the city in discharging a public duty and while so doing is subject to the control of the head of the city fire department, may properly be given, by a city ordinance, the right of way over other vehicles (except those carrying United States mail) on the city streets when going to or returning from a fire.**
2. **Although in seeking, through such fire patrol, to "discover and prevent fires and to save and preserve life and property at fires," the board of fire underwriters is primarily endeavoring to protect its own business interests, that work is none the less a public work which, if performed by the city itself, would be governmental; and the fact that its performance is primarily induced by private interest does not affect the power of the city to protect and aid the service by passing said ordinance.**
3. **Secs. 1636--51, 1636—55, Stats., giving the owners of motor vehicles "equal rights upon all public highways of this state with all other users of such highways," does not preclude the enactment of such an ordinance or interfere in any way with the power of the municipality to make regulations as to the use of its streets in the proper exercise of the police power.**

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Action to recover damages for the death of Louis R. Schultz, aged twenty-four, who was killed August 8, 1910, in a collision between defendant's patrol wagon and the motorcycle of the deceased on Eleventh street in the city of Milwaukee. The jury found (1) that the bell or gong on defendant's patrol wagon was sounded as it approached and reached Eleventh street; (2) that the patrol wagon did not approach and cross Eleventh street at an unreasonable rate

of speed; (3) that deceased was free from contributory negligence; and (4) damages in the sum of $2,500. Judgment for defendant was entered upon the special verdict, and plaintiff appealed.

For the appellant there were briefs by *Otjen & Otjen,* and oral argument by *H. H. Otjen.* They cited *Louisville R. Co. v. Louisville F. & L. P. Asso.* 151 Ky. 644, 152 S. W. 799.

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, and oral argument by *J. V. Quarles.*

The following opinion was filed November 14, 1916:

WINSLOW, C. J. The case was here before on a general demurrer to the complaint (161 Wis. 615, 155 N. W. 127), and it was then held that the defendant was not a municipal corporation and had no immunity from liability for the negligent acts of its servants even though they were performing duties which if performed by public officers would be governmental and public. It appeared upon the trial that an ordinance of the city of Milwaukee provided that officers and men of the defendant's fire patrol, as well as officers and men of the city fire department, should have the right of way upon the street when going to or returning from a fire, except over vehicles carrying the United States mail. The defendant's patrol wagon at the time of the accident was going west on Galena street towards Eleventh street in response to an alarm of fire, the horses being on a gallop. A little beyond the center of the crossing of the two streets the wagon ran over the deceased, who was coming from the north on Eleventh street and crossing Galena street.

The trial court held that the ordinance was a valid ordinance and charged the jury that under its terms the defendant's patrol wagon had the right of way over the deceased and that its driver had a right to assume that persons approaching Galena street would yield the right of way to him.

The question on this appeal is whether the court was correct in this position. We think this question must be answered in the affirmative.

While the defendant is not a municipal corporation it is not a corporation organized for private gain, but for the purpose of maintaining a fire patrol, whose duty it is to "discover and prevent fires and to save and preserve life and property at fires." Secs. 1922, 1923, Stats. This is a function which if performed by the city itself would be governmental or public. *Engel v. Milwaukee,* 158 Wis. 480, 149 N. W. 141.

It is conceded that, if the city performs this duty with its own apparatus and employees, it may properly give them the right of way on the streets in order that the work may be more efficiently done. There seems no reason why the city might not, if it thought best, contract with independent agencies to maintain fire apparatus and employees for the extinguishing of fires and the saving of property, retaining, of course, the power of control over their work; and if so it must follow that the city could also give such apparatus and employees the right of way over the streets. To hold otherwise would be to hold that the city could not choose such a method except at the expense of efficiency.

In the present case a private corporation not organized for gain is, at its own expense and in pursuance of legislative authority, assisting the city in the discharge of its public duty; it is subject to the control of the head of the city fire department while it is discharging that duty; so far as the community is concerned it is practically a public agency doing a public work under public control. The city cannot clothe that agency with immunity from its own negligence, but no reason is perceived either in law or morals why it may not in the interest of public welfare endow it with the same privileges on the public streets while engaged in public work as it gives to its own apparatus and employees engaged in the same work.

We do not consider that the general law giving the owners of motor vehicles the same rights on the public streets as all other users of highways (secs. 1636—51 and 1636—55, Stats.) interferes in any way with the power of the municipality to make regulations as to the use of its streets in the proper exercise of the police power. That law was evidently enacted to place motor vehicles on the same footing on the public streets with horse-drawn vehicles.

There is little authority on the subject. Under a peculiar constitutional provision in Kentucky a grant of right of way to a corporation of similar nature was held void, but the reasoning does not seem persuasive to us and there is no such constitutional provision in Wisconsin. A grant of similar nature in the charter of the city of New York was sustained by the courts of that state. *Duffghe v. Metropolitan St. R. Co.* 109 App. Div. 603, 96 N. Y. Supp. 324, affirmed in 187 N. Y. 522, 79 N. E. 1104, without opinion.

By the Court.—Judgment affirmed.

ESCHWEILER, J., took no part.

The appellant moved for a rehearing. The following opinion was filed January 18, 1917:

WINSLOW, C. J. If, as appellant's counsel vigorously urges, the statements of fact in the opinion in this case are absurd, then indeed they should be corrected regardless of the question whether counsel's strictures are either in good temper or good taste. This latter question we shall leave for him to consider for himself. Counsel says in effect that the present decision is in direct conflict with the decision upon demurrer to the complaint (161 Wis. 615, 155 N. W. 127) and that either the court was wrong then or wrong now. This contention makes it apparent to us that the opinion has not been understood. It may well be that this is the fault

of the writer, and it will be his endeavor now to make clear the court's position.

On the first appeal the city ordinance was not before the court. It stood admitted by the demurrer that the defendant's servants were guilty of negligent driving, and the only question was whether the immunity granted to municipal corporations while performing governmental acts was enjoyed by a private corporation doing similar acts. Upon this appeal a new fact is presented, namely, that the city has attempted to grant a right of way on the streets to the defendant's apparatus, which if valid justified the defendant's servants in driving as they did, and the question is whether the city could lawfully make this grant. Upon the first appeal the question was whether the defendant was immune from liability for its negligence, and it was answered in the negative. Upon the second appeal the question is whether the city could give the defendant the right of way over other vehicles on the streets, and this question is now answered in the affirmative. We are not able to perceive wherein these two decisions are inconsistent. There has been no intention of overruling or in any manner discrediting the former decision.

Special complaint is made of that part of the opinion which states that the defendant corporation is not organized for private gain and that it was assisting the city in the performance of a public duty. It is said, as the fact is, that this corporation is formed by the insurance agencies and companies carrying on the business of fire insurance in Milwaukee for the purpose of maintaining adequate rates, and correct practices in that business, and incidentally of maintaining the fire patrols in question for the purpose of saving property in case of fire, and thus reducing insurance losses. It is said that these are selfish rather than public purposes, and this also is true. It is not claimed, however, that the corporation has any capital stock, and it appears affirmatively

that the expenses of the patrol service are paid by assessment on the members. Perhaps it was not a happy use of language to say that the defendant was not organized for private gain, although it was strictly accurate in the sense that no dividends or other money returns would ever be received by its members from it. It is, however, expected that by its efforts the business of its members will be substantially benefited in various ways. In a broad sense this may perhaps be called private gain, and in this sense the defendant is organized for private gain. It is not perceived, however, how this affects the situation. The defendant in seeking to discover and prevent fires and to save life and property at fires is primarily endeavoring to protect its own business interests, very much as many of the property owners who became members of the old-fashioned volunteer fire departments were primarily moved to do so in order to protect their own property; but the work was and is none the less a public work, and a work which if performed by the city itself would be governmental. If the service be governmental in its nature, the fact that the defendant's private interest primarily induces its performance cannot logically affect the question of the power of the city to protect and aid the service by passing the ordinance in question.

By the Court.—Motion denied.

STASEK, Administrator, Appellant, vs. BANNER COFFEE COMPANY, Respondent.

October 25, 1916—January 16, 1917.

Poisons: Sale: Negligence: Delivery of matches: Death of child: Special verdict: Changing findings.

1. Sec. 1419, Stats., regulating the sale of poisonous drugs and chemicals and requiring that packages containing them be labeled "poison," does not apply to the sale of articles of merchandise, such as phosphorous matches, in which some poisonous drug or chemical may have been used.
2. Where phosphorous matches were delivered by a grocery company with other goods at a dwelling in the manner in which such deliveries were customarily made under similar circumstances, and the company could not have anticipated injury to another by reason of the delivery in such manner, it was not guilty of any negligence rendering it liable for the death of a child who opened the package and ate off the heads of some of the matches.
3. Where in an action for death alleged to have been caused by negligence the jury found specifically facts which absolutely negatived actionable negligence, the trial court properly changed or set aside other findings in the verdict to the effect that defendant was negligent and that such negligence was the proximate cause of the death.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The action is for damages on account of the death of the plaintiff's daughter and intestate aged about two years and three months, resulting, as alleged, from the negligence of the defendant. The facts were that in 1912 the plaintiff with his family occupied the second floor of a double house in Milwaukee, and one Jahnke with his family the first floor. The upper floor had no front entrance, and the rear entrance, which opened into a small hall on the first floor, was used by both families. There was a small platform about three feet

square in the hall. The defendant dealt in coffee, groceries, and other merchandise in Milwaukee and Mrs. Jahnke had been its customer. On the afternoon of the 24th day of July, 1912, the defendant delivered and left in said rear hall some merchandise consisting of coffee, soap, and matches, each article done up in a separate package, on said platform for Mrs. Jahnke, she not being at home. The defendant claims the goods were ordered by Mrs. Jahnke, but she denies the fact. The plaintiff claims that the goods were so left in the presence of his two children (the deceased and another girl about four years of age), who were playing in the hall. The defendant, however, claims that no one was in the hall or about the premises. While the packages were in the hall the children got hold of them and the intestate opened the package containing matches and ate off the yellow phosphorus heads of nine or ten matches, from the effects of which she died about a week later. There were six boxes of matches in the package and there was no poison label on the package or on the boxes themselves. The plaintiff claimed a common-law liability on the ground of negligence, as well as a statutory liability because of the failure to comply with the requirements of sec. 1419, Stats. 1913, regulating the sale of poisonous drugs and chemicals and requiring that the package containing them be labeled "poison."

The jury found by special verdict (1) that the defendant in the exercise of ordinary care ought not to have anticipated injury to another by reason of the delivery of the matches in the manner in which they were delivered; (2) that such delivery was made in the manner customary in Milwaukee under similar circumstances; (3) that the defendant did not exercise ordinary care in making the delivery as it did; (4) that such failure to exercise ordinary care was the proximate cause of the death of the intestate; (5) that the merchandise was not delivered pursuant to an order by Mrs.

Jahnke; (6) that no failure to exercise ordinary care on the part of the mother of the deceased proximately contributed to the death of the intestate; (7) that the damages for loss of services amounted to $850, and (8) for the pain and suffering of the deceased amounted to $650. The court on motion changed the answer of the third question of the verdict so that it became a finding that the defendant exercised ordinary care in making the delivery, struck out the answer to the fourth question, and entered judgment for the defendant as so amended. From this judgment the plaintiff appeals.

W. C. Seefeld, for the appellant.

For the respondent there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

The following opinion was filed November 14, 1916:

WINSLOW, C. J. The judgment must be affirmed. The statute regulating the sale of poisonous drugs and chemicals plainly does not apply to the sale of articles of merchandise in whose manufacture some poisonous drug or chemical may have been incidentally used. To so hold would be to extend the act by construction to cases manifestly not intended to be covered by it.

When the jury found that the packages were delivered in the manner in which such deliveries were customarily made, and that the defendant could not have anticipated that injury would happen to another by reason of the manner of the delivery, they found the facts which absolutely negatived actionable negligence. These findings of fact necessarily control the question of ordinary care and justify the court in changing the answer to the third question of the verdict and striking out the answer to the fourth question. If the delivery was made in the usual and customary way under similar circumstances, it follows that ordinary care was exercised unless such custom is so obviously dangerous to life or limb

as to be recognized as such by all intelligent people. *Bandekow v. C., B. & Q. R. Co.* 136 Wis. 341, 117 N. W. 812.

By the Court.—Judgment affirmed.

ESCHWEILER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on January 16, 1917.

GARDNER, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY and others, Appellants.

October 25, 1916—January 16, 1917.

Carriers: Injury to passenger in alighting: Defect in car step: Evidence: Sufficiency: Verdict based on conjecture: Duty to assist passenger: Appeal: Disposition of case: Directing dismissal.

1. In an action for injuries sustained in alighting from an interurban car, plaintiff's testimony that the heel of her right foot sank into or caught in something on the first step down from the platform of the car, causing her to fall, and that she did not slip, was insufficient, in the absence of any other evidence of a defect in the car step, to show any negligence of defendants.
2. Findings by the jury in such case that the car step was out of repair and that defendants in the exercise of ordinary care ought to have discovered its defective condition in time to have prevented the injury to plaintiff, are *held* to rest upon conjecture.
3. Plaintiff being a woman about forty-six years old, in good health, and burdened only with a light handbag when she fell, and the car being standing still at a terminal station, no duty devolved upon defendants to assist her in alighting.
4. Plaintiff's evidence at two trials having been substantially the same and insufficient to establish a cause of action, and there being no probability of new evidence at another trial, upon reversal of a judgment in her favor the dismissal of the action is directed.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action for personal injury. On July 17, 1914, at about 8 o'clock in the evening, as plaintiff alighted from one of defendants' cars at the terminal on Grand avenue and Second street, on which she had been a passenger from Evanston, she claims her right foot sank into or was caught in the first step of the car from the platform in such a manner that she fell and was injured. It was claimed by defendants that plaintiff fell from car No. 303 and that its steps were free from defects of any kind. The jury found (1) that the car from which plaintiff fell was not car No. 303; (2) that the step upon which plaintiff stepped in alighting was out of repair; (3) that such defective condition of the car step was the proximate cause of plaintiff's injury; (4) that defendants in the exercise of ordinary care ought to have known of its defective condition in time to have prevented the injury to plaintiff; (5) that there was a want of ordinary care on the part of defendants' servants in failing to assist plaintiff to alight from the car; (6) that such want of ordinary care was the proximate cause of plaintiff's injury; (7) that the injury to plaintiff was not the result of a mere accident; (8) that plaintiff was free from contributory negligence; and (9) damages in the sum of $2,500. A previous trial of the case resulted in substantially the same verdict, the jury, however, in that case awarding damages in the sum of $4,250. Judge FRITZ, before whom the first trial was held, set aside the verdict and granted a new trial upon the ground, as we understand, that he was not satisfied that justice had been done. Upon the last trial Judge TURNER changed the answer to the first question and held the evidence conclusively showed that plaintiff fell from the step of car No. 303, but entered judgment for plaintiff upon the amended verdict, and defendants appealed.

For the appellants there was a brief by *Edgar L. Wood*, attorney, and *Bull & Johnson*, of counsel, and oral argument by *Mr. Wood*.

William E. Burke, for the respondent.

The following opinion was filed November 14, 1916:

VINJE, J. Plaintiff was about forty-six years of age, in good health, and carried only a light handbag at the time of her injury. She was the last passenger to alight. She testifies she stepped from the platform with her right foot squarely on the first step, then as she raised her left foot and put it forward to step down to the next step she felt the heel of her right foot sink in or catch in something and she fell. She says her foot did not slip.

"*Q.* What if you know caught the heel of your shoe in the manner in which you have described? *A.* Well, there must have been something the matter with the step, something wrong with it, because when I stepped like this I either caught or sunk in, something was hold of me some place. Court: *Q.* You mean something was hold of you some place, where? *A.* Well, I meant my ankle or my — *Q.* Foot? *A.* My foot. I couldn't step. *Q.* You couldn't lift it up? *A.* No."

She further testified that she was not hurried, that she was calm and got off the car as she usually did; that she can't say that she looked where she stepped, and did not look at the step after she fell. No one else saw her fall and there is no other evidence of a defect in the car step. The jury not only found there was a defect, but that it had existed so long that the defendants in the exercise of ordinary care ought to have discovered the defective condition in time to have prevented the injury. To our minds both findings rest upon conjecture. There is nothing in the evidence that furnishes any basis for a reasonably certain correct conception of the nature of the alleged defect, much less of its duration. Plaintiff, herself, is compelled to resort to an alternative, for she says her heel either sank in or was caught by something, but how or why it sank in or how or why it was caught we don't know. From

the description given we can form no mental conception of the alleged defect. We can guess that it consisted of this or that defect, but we don't know which. Or the step may not have been defective at all, for plaintiff may have fallen as she described without any actionable defect therein. Verdicts cannot rest upon conjecture. *Coel v. Green Bay T. Co.* 147 Wis. 229, 133 N. W. 23.

This is not a case of *res ipsa loquitur,* but an ordinary negligence case in which the burden rests upon the plaintiff to show to a reasonable certainty the nature and character of defendant's negligence. Proof of negligence may be by testimony of what is seen, heard, felt, or smelled, provided it is so definite and satisfactory as to render reasonably certain the nature or character of the negligence testified to. When, as here, it fails to do this, it falls short of the legal test.

In our view of the case it is not material whether or not the accident happened upon car No. 303, as the court found, or whether defendants' testimony that its car steps were free from defects is satisfactory or conclusive, because giving, as we do, full credence to plaintiff's own testimony we hold that it fails to establish a cause of action.

Plaintiff was a woman about forty-six years of age, in good health, and burdened with only a light handbag when she fell, and the car was standing still at a terminal station. Under such circumstances no duty devolved upon defendants to assist her in alighting.

Plaintiff has had two trials in which her testimony has been substantially the same. It is not probable that any new evidence can be furnished upon another trial. She is therefore in the unfortunate position of not being able to show in what respect defendants were negligent.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action.

A motion for a rehearing was denied, with $25 costs, on January 16, 1917.

STATE EX REL. KLEIST VS. DONALD, Secretary of State.

October 28, 1916—January 16, 1917.

Constitutional law: Courts: Removal of circuit judges: Shortening term: Power of legislature: Invalid statute: Presumptions: Knowledge of law: Elections: Validity: Failure to give notice, etc.: Official ballots: Mandamus to compel issuance of certificate of election: Parties.

1. In view of sec. 13, art. VII, Const. (prescribing the method by which a circuit judge may be removed), and sec. 6, art. VII (providing that no alteration of the boundaries of a circuit shall have the effect to remove a judge from office), the power of the legislature under sec. 7, art. VII, to fix the term of office of circuit judges cannot be so exercised as to have the effect of removing a circuit judge from office. Ch. 6, Laws 1915, shortening by one year the term of one of the judges for the Second circuit, was therefore void.
2. The fact that such judge voluntarily submitted himself as a candidate at an election held pursuant to said ch. 6, Laws 1915, was not an effective consent to the shortening of his term, a public right being involved which could not be affected in that way.
3. There is no presumption that every person knows the law as a fact. A better statement of the rule is that ignorance of the law affords no excuse for its violation.
4. An unconstitutional act of the legislature is not a law; it confers no rights, it imposes no penalties, it affords no protection, it is not operative, and in legal contemplation it has no existence.
5. Where there is in fact an election at the time and place designated by law, such election is valid although the statutory notice was not given.
6. Where the failure to comply with the law results in a few only out of a large number of electors exercising the right to vote at the time and place designated by law, there is no election.
7. The proper officers, acting in good faith in accordance with a void statute, refused to give notice of an election and there was no compliance in any respect with the laws relating to official ballots and their use. The relator, without seeking judicial relief to compel said officers to perform their duty, gave extensive notice through various publications that he was a candidate and solicited votes at an election to be held at the time fixed by law. The electors generally believed that no election was to be held, and comparatively few voted, casting their ballots for the relator, there being no other candidate. *Held*, that there was no

election. *State ex rel. Peacock v. Orvis*, 20 Wis. 235, and other cases, distinguished.

8. The statutes regulating elections, and especially the provisions relating to official ballots, are assumed to be reasonable and constitutional.

9. Where the judgment in a *mandamus* proceeding to compel the issuance of a certificate of election to the relator neither diminishes nor enlarges the rights of the incumbent of the office, the failure to make him a party is immaterial.

MANDAMUS brought by the relator in this court upon leave granted, the attorney general having declined to prosecute the action in his own name.

It appears from the petition that ch. 474, Laws 1909, provided for an additional judge for the Second circuit (Milwaukee county), his term to begin May 1, 1910, and to expire on the day preceding the first Monday in January, 1917, and an incumbent was elected in April, 1910. Ch. 474 was incorporated in the revised statutes as part of sec. 113.01. Ch. 6 of the Laws of 1915 amended that section by changing the date of the commencement of the term of said judge from the first Monday in January, 1917, to the first Monday in January, 1916, thereby shortening the term one year. After the amendment of the law an election to be held in April, 1915, was regularly called, noticed, and advertised as provided by law. The first incumbent was chosen to succeed himself and qualified and entered upon his duties on the first Monday in January, 1916.

Relator, claiming that the act shortening the term from January, 1917, to January, 1916, was unconstitutional and void, attempted to become a candidate at the election held April 4, 1916, for the term to begin on the first Monday in January, 1917, that being the date of the expiration of the term as originally fixed by ch. 474 of the Laws of 1909. The secretary of state gave no notice of an election for such office. On March 24th relator demanded that such notice be given, but the secretary of state refused to give any notice of an election for circuit court judge for branch No. 6, or of the

candidacy of the relator, and no official notice of the holding of an election for said office was given by any one. Thereupon the relator caused notice to be given by publication of the following advertisement in practically all of the leading papers of general circulation published in Milwaukee county:

"JOHN C. KLEIST

(of Whitefish Bay, Milwaukee county, state of Wisconsin) announces that he is a Non-Partisan candidate for the office of circuit judge, branch No. 6, of the Second judicial circuit, in Milwaukee county, state of Wisconsin, to succeed Hon. Franz C. Eschweiler, for the full term beginning on the first Monday in January, 1917, and ending the day preceding the first Monday in January, 1923, and solicits the suffrage and votes of all qualified electors and voters of Milwaukee county aforesaid at the judicial election to be held in said Milwaukee county on April 4, 1916, and requests that the voters write his name and title of office on blank space at the bottom of the official judicial ballot, or make a cross in the square opposite his name on 'sticker' to be pasted at bottom of said ballot as follows:

For Circuit Judge
Branch No. 6,
To succeed F. C. Eschweiler,
John C. Kleist.

"P. S. Cut this out and take with you to booth for assistance in voting."

The advertisement was also translated and published in the German and Polish papers. Relator also caused 80,000 handbills to be distributed bearing the advertisement. It does not appear that he circulated or filed any nomination papers as required by law.

It further appears that at the election held April 4, 1916, there being no other candidate for the office of circuit judge for branch No. 6, 3,000 votes were cast for the relator, of which but 1,470 were canvassed and returned by the election officers. While the fact is not stated, the total number of votes cast in Milwaukee county for the several candidates for justice of the supreme court in April, 1916, was 62,053.

There was no place upon the official ballot indicating that any one was to be voted for for circuit judge of branch No. 6, Second circuit, and, so far as the facts appear from the petition, such voting was done by attaching a paster to the official ballot in the following form:

"For Circuit Judge
Branch No. 6
JOHN C. KLEIST....☐
To Succeed F. C. Eschweiler,
A Nonpartisan Judiciary."

It further appears that return was made of the votes so cast to the secretary of state, who refused to issue a certificate of election to relator, and thereupon the relator brought this proceeding to compel the issue of a certificate of election by the secretary of state. Further facts appearing in the petition will be stated in the opinion. The defendant appeared and moved to quash the alternative writ of *mandamus* granted upon the petition, for the reason that neither the petition nor the alternative writ states facts showing that relator is entitled to the writ prayed for.

Henry S. Sloan, attorney, and *Walter D. Corrigan* and *Charles E. Pierce,* of counsel, for the plaintiff.

For the defendant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

ROSENBERRY, J. Two questions are presented by the record in this case:

(1) Is ch. 6 of the Laws of 1915, amending sec. 113.01, Stats., by which the term of office of the circuit judge of branch 6 of the Second circuit is shortened so as to expire on the day preceding the first Monday in January, 1916, instead of on the day preceding the first Monday in January, 1917, a valid enactment?

(2) If ch. 6 of the Laws of 1915 is void, was the relator elected at the election held April 4, 1916, as circuit judge for branch No. 6 of the Second circuit?

Relator contends that ch. 6 of the Laws of 1915 is void for two reasons: (a) It shortens the term of office of a circuit judge. (b) It is a local law and its purpose is not expressed in its title.

In our view of the case we need discuss the first reason only. Prior to April, 1897, sec. 7 of art. VII of the constitution of this state was as follows:

"For each circuit there shall be a judge chosen by the qualified electors therein, who shall hold his office as is provided in this constitution, and until his successor shall be chosen and qualified; and after he shall have been elected, he shall reside in the circuit for which he was elected. One of said judges shall be designated as chief justice in such manner as the legislature shall provide. And the legislature shall at its first session provide by law as well for the election of, as for classifying, the judges of the circuit court to be elected under this constitution, in such manner that one of said judges shall go out of office in two years, one in three years, one in four years, one in five years and one in six years, and thereafter the judge elected to fill the office shall hold the same for six years."

Under this provision of the constitution there was considerable doubt as to whether the legislature had power to provide an additional judge for the Second circuit, and in 1897 sec. 7 was amended to read as follows:

"For each circuit there shall be chosen by the qualified electors thereof one circuit judge, except that in any circuit composed of one county only, which county shall contain a population, according to the last state or United States census, of one hundred thousand inhabitants or over, the legislature may, from time to time, authorize additional circuit judges to be chosen. Every circuit judge shall reside in the circuit from which he is elected, and shall hold his office for such

term and receive such compensation as the legislature shall prescribe."

Laws were enacted providing for additional judges for the Second circuit from time to time, and ch. 474, Laws 1909, was an act which provided for one of the additional judges, who thereafter (ch. 592, Laws 1913) was designated as circuit court judge for branch No. 6 of the Second circuit.

The legislature being of the opinion that it could, under sec. 7 of art. VII as amended, shorten the term of office of a circuit judge, enacted ch. 6 of the Laws of 1915, and the following cases are cited to sustain the action of the legislature: *State v. Douglas,* 26 Wis. 428, 430; *State ex rel. Martin v. Kalb,* 50 Wis. 178, 6 N. W. 557; *O'Connor v. Fond du Lac,* 109 Wis. 253, 269, 85 N. W. 327; *Fordyce v. State ex rel. Kelleher,* 115 Wis. 608, 614, 92 N. W. 430; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 48, 98 N. W. 954; *State ex rel. Buell v. Frear,* 146 Wis. 291, 299, 131 N. W. 832.

Were there no other constitutional provisions than sec. 7 of art. VII, the conclusion contended for might follow. However, there are other provisions. Sec. 6 of art. VII is as follows:

"The legislature may alter the limits or increase the number of circuits, making them as compact and convenient as practicable, and bounding them by county lines; but no such alteration or increase shall have the effect to remove a judge from office. In case of an increase of circuits, the judge or judges shall be elected as provided in this constitution and receive a salary not less than that herein provided for judges of the circuit court."

Sec. 13 of art. VII provides how judges may be removed and is as follows:

"Any judge of the supreme or circuit court may be removed from office by address of both houses of the legislature, if two thirds of all the members elected to each house concur therein, but no removal shall be made by virtue of this section unless the judge complained of shall have been served

with a copy of the charges against him, as the ground of address, and shall have had an opportunity of being heard in his defense. On the question of removal the ayes and noes shall be entered on the journals."

We are in effect asked to hold that by the amendment of sec. 7 of art. VII, adopted in 1897, the constitution provided for another form of removal, to wit, by act of the legislature shortening the term of office of a circuit judge, which to all intents and purposes effects a removal.

That such was the effect of the amendment would come as a great surprise not only to the members of the profession but to the people of the state generally. Nothing in the history of its adoption leads us to suppose that any such purpose was contemplated either by the legislature who submitted the amendment or by the people who approved it. The constitution having prescribed the particular method by which a circuit judge may be removed, and the power of the legislature to alter boundaries of circuits having carefully provided that the alteration of a circuit should not have the effect of removing a judge from office, the rule of construction *expressio unius est exclusio alterius* is peculiarly applicable to this situation. *State ex rel. Owen v. Donald,* 160 Wis. 21, 134, 151 N. W. 331.

We must hold, therefore, that the language of sec. 7 as amended, "Every circuit judge shall reside in the circuit from which he is elected, and shall hold his office for such term and receive such compensation as the legislature shall prescribe," must be read in connection with secs. 6 and 13 of the same article, and the power of the legislature to fix the term of office of circuit judges cannot be so exercised as to have the effect of removing a circuit judge from office. Ch. 6 of the Laws of 1915 had that effect and is therefore unconstitutional and void.

It may be argued that the incumbent of that office, by voluntarily submitting himself as a candidate, consented to the shortening of his term and that the law did not have the ef-

fect of removing him from office. The right sought to be vindicated in this action is a public right, to wit, the right of the people to choose a circuit judge for branch No. 6 of the Second circuit. This action is entertained here in the exercise of the original jurisdiction of this court, not to vindicate a private right, but to establish a public right, although a private right may be incidentally affected. So the incumbent was incapable of giving any assent, formal or informal, by which the rights of the people could in any way be diminished.

Was the relator elected circuit judge for branch No. 6 at the election held April 4, 1916?

It is contended that every one is presumed to know the law; that the electors of Milwaukee county therefore knew that there was to be an election on April 4, 1916, for the office of circuit judge of branch No. 6; that the right of the electors cannot be taken away by the failure of election officers to perform the duties imposed upon them by law, and that an election cannot be held invalid because no notice was given; and the following cases are cited as sustaining the proposition that relator was therefore legally elected: *State ex rel. Peacock v. Orvis,* 20 Wis. 235; *State ex rel. Lutfring v. Gœtze,* 22 Wis. 363; *State ex rel. Chase v. McKinney,* 25 Wis. 416; *State ex rel. Bruce v. Davidson,* 32 Wis. 114; *State ex rel. Heim v. Williams,* 114 Wis. 402, 90 N. W. 452; *Janesville W. Co. v. Janesville,* 156 Wis. 655, 146 N. W. 784.

In the first place there is no presumption that every person knows the law as a fact. A better statement of the rule is that ignorance of the law affords no excuse for its violation. It is a rule of administrative law and not strictly a rule of evidence, and has no application to the facts in this case. *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 72, 126 N. W. 554.

An unconstitutional act of the legislature is not a law; it confers no rights, it imposes no penalties, it affords no pro-

tection, and is not operative, and in legal contemplation it has no existence. *Norton v. Shelby Co.* 118 U. S. 425, 442, 6 Sup. Ct. 1121; *Bonnett v. Vallier,* 136 Wis. 193, 200, 116 N. W. 885. Therefore an election should have been held April 4, 1916, to elect a judge for branch No. 6 of the Second judicial circuit, ch. 6 of the Laws of 1915 being unconstitutional and void.

Was there an election? In order to answer this question the authorities must be reviewed. After a careful review and examination of the authorities cited above and many others not cited, it appears that two principles are deducible therefrom: (1) Where there is in fact an election at the time and place designated by law, such election is valid although the statutory notice is not given. (2) Where the failure to comply with the law results in a few out of a large number of electors exercising the right to vote at the time and place designated by law, there is no election. A restatement of the cases would extend this opinion to an undesirable length. The law is stated by the court in *State ex rel. Chase v. McKinney,* 25 Wis. 416, 420, as follows:

"Furthermore, it incontestably appears from the answer that no notice whatever was given that a district attorney was to be chosen at that election, either by the posting of the notices of the election by the officers whose duty it was to post them, or by the newspapers, or in any other manner; and the great body of the electors of the county voted for other officers, but cast no votes for district attorney, because they did not know that one was to be elected. As a consequence, in a county consisting of forty-one election districts, in which 7,129 votes were cast for other officers, there were cast for the relator 149 votes in five of the election districts; in thirty-six districts no votes being cast for district attorney. Now, under these circumstances, it seems to us impossible to say that there has been any valid election for district attorney such as the law contemplates. Certain it is, that the great mass of the electors of the county have exercised no choice as to who should fill the office of district attorney. No official notice, nor any other kind of notice, was given that a vacancy

existed in that office, which they were required to supply at the election. It is obvious, therefore, that there has been no expression of the will of the electors as to who should fill the vacancy."

In all these cases except the *Williams Case* and the *Janesville Case* elections were held at a time when the electors were not required to use an official ballot in voting. Since the decision of these cases fundamental changes have been made in the laws relating to elections. The legislative regulations in force at the time the election in question here was held were numerous and minute and must necessarily have affected one way or the other the minds of the electors. An elector was not permitted to prepare his ballot in any form he chose. When he approached the voting place he was handed a ballot which gave him notice of the offices which were to be voted for and of the candidates who were entitled to have their names printed upon such ballot. The law forbids the use of any other ballot (secs. 6.25 and 6.41, Stats.), and, subject to his right to erase the name of any candidate whose name is printed upon the ballot and to write in another, or to write in the name of a candidate for any office, the name of the office appearing in the appropriate place upon the ballot, he was required to express his choice in the manner indicated on the official ballot, and the use of stickers was strictly forbidden. Sub. (11), sec. 6.23, Stats. While there can be no claim in this case that the relator did not attempt to give general notice of his candidacy and caused notice of his claims to be generally and widely circulated, it also appeared at the same time that the secretary of state had upon his demand refused to give notice of an election, and likewise the county clerk had refused his demand that notice of an election be given. The people understood that the attorney general had ruled adversely to relator's claim that his name should be placed on the official ballot, as well as the county clerk, whose duty it was to provide the official ballots.

No nomination papers were filed or circulated. The fact that there was a law upon the statute books which required that an election should be held in 1915 instead of 1916, the fact that it had been passed by the legislature, approved by the judiciary committees thereof, and signed by the governor, was well known and generally understood. So that what the people of Milwaukee county in fact had notice of was that relator claimed that an election should be held; that all of the officers having to do with the administration of the election laws held and contended that no such election should be held. The people were not ignorant in regard to the matter; they believed that no election was to be held. While ch. 6 of the Laws of 1915 gave no rights and did not alter the law, nevertheless the void law and the refusal of the election officers to act effectually prevented the electors of Milwaukee county from exercising their right to choose a circuit judge for the sixth branch of the Second judicial circuit.

Along with all the other facts which were commonly known was the fact that the courts stand open to afford relief to a person situated as was the relator and that no appeal was made to the courts for the exercise of the power possessed by them. An application by relator for the exercise of the original jurisdiction of this court under circumstances such as are presented by this record would have met with a favorable and speedy response, as the records of this court in recent years show.

If failure to give the statutory notice were the only defect appearing, we might feel bound, in view of the prior decisions of this court and of the very extensive notice which relator gave, to hold that there was a valid election although but a comparatively few electors voted, as in the *Gœtze Case* (22 Wis. 363). Here, however, there was not only an entire want of official notice of an election, but there was a complete failure to comply with the election laws in any re-

spect. The laws relating to the form of the official ballot; the right of candidates to have their names appear thereon; its preparation and distribution; the means adopted for its identification as the official ballot; the minute regulations as to how the voter is to indicate his preference; the denial of the right to use any other form of ballot, and the numerous other provisions regulating its use, have created a situation far different from that which existed when each elector prepared or had prepared for him his own ballot in any form he might choose. Under the law as it now stands the administrative officers of the state and of the municipalities are charged with the duty of determining certain questions, and the electorate very generally rely upon the determination so made. In this case there is no claim that the refusal of the secretary of state to give the statutory notice or of any other officer to perform any duty imposed upon him by law was wilful or done in disregard of his official duty, but upon the contrary was done in good faith and based throughout upon a determination by the respective officers that no election for the office in question was required by law to be held as contended by relator. There was no failure of the officers to act; there was a refusal to act, based upon a claim of right. It is not necessary in this case to hold that a ballot cast for an office not appearing upon the official ballot as required by law is void, although such ruling might be sustained upon reason and authority. We prefer in this case to rest our decision upon the proposition that it clearly appears upon the whole record that by reason of the refusal of the administrative officers to perform the duties imposed upon them by law, the electors of Milwaukee county generally believed that no election was in fact to be held and that the casting of a comparatively few out of a large number of votes for the relator did not constitute an election. If it be argued that this conclusion disfranchises the electors who did exercise the right which the law gave them, it is a sufficient answer to say that

the contrary conclusion would disfranchise twenty times as many.

It is to be regretted that the relator did not seek judicial relief at the appropriate time, when the result would have been that the electorate generally would have been officially apprised of the fact that an election for the office in question was to be held. However, it clearly appears upon the facts presented by the record that the electors did not have such belief and that the refusal of the election officers to give the notice required and to comply with the other requirements of the law relating to the holding of an election resulted in no election in fact being held.

The conclusion arrived at in this case does not overrule the former decisions of this court beginning with *State ex rel. Peacock v. Orvis,* 20 Wis. 235, but the principles embodied in those decisions are adhered to. The situation presented by this record, in view of subsequent statutory regulations relating to elections, and especially the provisions prohibiting the use of any other than the official ballot (sub. (2), sec. 6.25, Stats.) and requiring the voter to indicate his choice in the manner specified in ch. 6, clearly distinguish this case from any of the cases referred to. These laws have been in force for a long period of time and they have not been attacked as unreasonable, and we must therefore assume that they are reasonable, constitutional legislative regulations. The failure of the administrative officers as well as the candidate to comply with the requirements of these laws presents a different situation than any heretofore considered by this court.

It has been suggested that the present incumbent of the office should be made a party to these proceedings. We know judicially that the present incumbent can hold his office only until his successor is elected and qualified; that in any event there must be an election at the coming spring election for the office in question; so that the rights of the present incum-

bent are neither diminished nor enlarged by the judgment in this case.

By the Court.—Motion to quash writ granted without costs.

ESCHWEILER, J., took no part.

KIRKPATRICK, Appellant, vs. KEPLER and others, Respondents.

November 17, 1916—January 16, 1917.

Sales: Express and implied warranties: Bond to protect buyer against claims.

1. In a bond given by the sellers of cheese to protect the buyer against claims of third persons, recitals as to an agreement made by said buyer with "all persons interested in the ownership of said cheese" that he would purchase the same if said persons would indemnify him against any judgment recovered by any other claimant, together with the fact that the sellers received from him the full market and purchase price of the cheese, are *held* to constitute an affirmation and an express warranty of ownership, under sec. 1684*t*—12, Stats.
2. There being nothing in the circumstances of the sale itself or in the language of the bond to indicate a contrary intention, there was, under sub. (1), sec. 1684*t*—13, Stats., an implied warranty of right to sell the cheese, even though it was not at the time in the possession of the sellers.
3. The very purpose of the bond being to secure the buyer against the claims of certain persons known to both parties, it cannot be construed as showing any "contrary intention" to an implied warranty, and the sellers are not relieved from liability by sub. (3), sec. 1684*t*—13, Stats.
4. The agreement for the sale itself being oral and separate and distinct from the bond, the rule is not applicable that where there is a written contract of sale with an express warranty, other than such warranty as the law implies, no other or different warranty can be proven by parol.

WINSLOW, C. J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from a judgment in favor of defendants dismissing plaintiff's complaint.

The plaintiff is a dealer in cheese in Richland Center, and on September 1, 1913, paid the defendants *A. L. Kepler, A. H. Ray, C. H. Babb, L. C. Brown, James Draper, Fred McMillan, E. E. Kepler, S. Roudebush, William Wanless,* and *J. E. Davis* $690.27 for eighty-three boxes of cheese at the then market price. These named defendants had been patrons of a cheese factory in Richland Center owned by one Walker, for whose estate the defendant *Christie Walker* was administratrix. These eighty-three boxes of cheese had been delivered on June 20, 1913, to one H. J. Bamford at his cold-storage warehouse in Richland Center under an arrangement for selling the same. On June 23d and 27th Bamford gave two warehouse receipts for this cheese to the First National Bank of Richland Center for his then indebtedness to said bank. Shortly thereafter Bamford was adjudicated a bankrupt and appears to have made a composition with his creditors, in which composition none of the defendants appear to have participated.

After the bankruptcy of Bamford the said bank, which owned the storage warehouse occupied by Bamford, leased the same to plaintiff, who, on August 8th, gave a warehouse receipt to the bank for all the cheese he found in said warehouse on taking possession, which included the eighty-three boxes in question here. This warehouse receipt was not given on account of any obligation owing to the bank by plaintiff.

Shortly before the plaintiff paid the defendants for this cheese he talked with their attorney and then with some of the defendants about the purchase, and as a result of such conversations an instrument was drawn by defendants' attorney and submitted by the plaintiff to his attorney and which was signed by all the defendants other than *Walker,*

and delivered to plaintiff, and which is in substance as follows:

"Know all men by these presents: That whereas the undersigned patrons of a cheese factory known as the Walker Factory . . . and Frank E. Walker, manufacturer of cheese at such factory, delivered to a cold-storage building in Richland Center, in said county, on and between the 16th day of June, 1913, and the 30th day of June, 1913, 117 boxes of cheese . . . , which said cold storage was at the time of first delivery of said cheese managed and operated by one H. J. Bamford; and whereas the said H. J. Bamford has since said time been adjudicated a bankrupt . . . , and whereas said Bamford has secured a composition in said court, and whereas a question of title has arisen as to such cheese, the First National Bank of the city of Richland Center claiming to hold warehouse receipts on the whole or a part thereof. And whereas *John Kirkpatrick,* of the city of Richland Center, has leased such warehouse cold storage containing said cheese, . . . and whereas it is deemed to be the best advantage of all persons interested that such cheese remaining in said warehouse be sold and disposed of at the best market price, and whereas, the said *John Kirkpatrick* has entered into an agreement with all persons interested in the ownership of said cheese to purchase the same at a price to be fixed between himself and said parties on condition that those interested as owners thereof will indemnify him against all or any judgment that may be entered against him in case any person, partnership, or corporation shall make claim therefor:

"Now, therefore, the undersigned [defendants named] and Frank E. Walker, manufacturer, having a special interest in said cheese for the amount due him for making the same, hereby acknowledged themselves to be indebted to the said *John Kirkpatrick,* his heirs and administrators or assigns, in the penal sum of two thousand dollars . . . for the payment of which we bind ourselves, our heirs, executors and administrators firmly by these presents.

"Sealed with our seals and dated this 1st day of September, 1913.

"The condition of this bond is such that whereas upon the

facts hereinbefore stated and the execution and delivery of this bond to said *John Kirkpatrick,* has purchased such cheese,

"Now, therefore, if the said *John Kirkpatrick* shall be saved harmless and indemnified against all costs and damages that may be awarded against him in any court having jurisdiction upon any action brought by any person, firm, or corporation claiming an interest in said cheese, provided that if any action shall be begun against him, or in which he may be made a party, he will promptly notify the said bondsmen or Burnham & Black of Richland Center, Wisconsin, as their attorneys, tendering to them the defense of said action and permitting them and the signers of this bond to defend said action at their own expense, the signers to this bond will pay any and every judgment that may be entered up against him by any court having jurisdiction thereof with costs growing out of said action to be defended by the signers of said bond, then this obligation shall be void; otherwise to remain in full force to the amount said *John Kirkpatrick* may sustain."

Shortly thereafter the bank, in the absence of plaintiff and without his consent, took possession of the cheese in question without any legal process and claiming the right to do so under the three warehouse receipts above specified, and thereafter disposed of the cheese.

An action was brought by plaintiff against the bank in connection with this transaction and defendants were brought into that action, but it was dismissed by plaintiff and this action instituted.

The complaint herein alleged that the defendants offered to sell this cheese and warranted it to be the property of the defendants; that plaintiff relied on the warranty and purchased and paid for it; that it was then the property of Bamford and was subsequently taken by the bank as recited.

The answer of the defendant *Christie Walker* recited her appointment as administratrix of the estate of Frank Walker, deceased; that proceedings were had in the probate court

whereby a time was limited for creditors to file claims; that the time had expired; that no claim by plaintiff had been filed in the estate, and that the same was therefore barred.

The answer of the other defendants in substance set forth that they offered to sell to the plaintiff the cheese, but specifically deny that there was any warranty that the cheese was the property of the defendants. They admit that the plaintiff purchased the cheese as stated in the complaint and paid for the same. They then recite the arrangement with Walker for the manufacture of the cheese and the delivery of the same to Bamford subject to a sale to him when the same had been inspected and a price agreed upon, but allege that before such sale was consummated Bamford was adjudicated a bankrupt and that his trustee claimed title to said cheese, but that the defendants refused to recognize said claim and filed no claim in such bankruptcy proceedings; that before the sale to plaintiff he stated that he would take such cheese if defendants would guarantee title thereto, he fearing suit would be brought against him for converting the cheese on account of the alleged transactions with Bamford and the giving by Bamford to the bank of the warehouse receipts, and if the defendants would execute and deliver to the plaintiff a bond signed by themselves, conditioned that in the event of an action being brought by any person, firm, or corporation claiming an interest in said cheese against the plaintiff, or in which he might be made a party, the signers of the bond would pay every judgment that would be entered up against him with the costs, provided that he gave notice to defendants or their attorneys and tendered the defense of the action to them,—this being the same bond recited in the statement of facts. They further allege that the plaintiff had full knowledge of all the facts concerning the delivery of the cheese at the warehouse, the manner in which it was received, and the claim of the trustee, but withheld from them the fact that he had given the warehouse receipt to the bank. It also

recites that, after the taking of the cheese by the bank, plaintiff was informed by defendants' attorneys that he should bring an action for replevin and that such attorneys would carry it on without costs to him and the defendants would pay the costs, but that instead of so doing the plaintiff himself commenced an action for conversion against the bank without tendering to defendants the right to bring that action, to which action the defendants were made parties, and its subsequent dismissal.

Upon the trial the following special verdict was found by the jury:

"(1) At the time of the sale of this cheese to the plaintiff, had title thereto passed from defendants to Mr. Bamford? *A.* Yes.

"(2) At the time of the sale of this cheese to plaintiff, was there any warranty as to the title of this cheese other than that contained in the bond signed by them? *A.* No.

"(3) Was it the intention of the defendants that there should be a warranty of title outside of the bond? *A.* No."

After several motions by the respective parties after verdict the court directed a judgment for defendants upon the verdict, and from the judgment so entered plaintiff appeals.

For the appellant there was a brief by *L. H. Bancroft,* attorney, and *Gilbert & Ela,* of counsel, and oral argument by *Mr. F. L. Gilbert* and *Mr. Bancroft.*

For the respondents there was a brief signed by *Burnham & Black,* attorneys, and *Jones & Schubring,* of counsel, and oral argument by *Burr W. Jones* and *O. D. Black.*

ESCHWEILER, J. The plaintiff seeks to recover the amount he paid to the defendants for the eighty-three boxes of cheese on the theory that there was a failure of consideration and a breach of warranty of title.

For the purposes of this case it may be considered that a warranty may have been given by the defendants in one or

more of three ways: first, by an express oral warranty; second, by an affirmation of title to be found in the language of the undertaking given by the defendants, under sec. 1684*t*—12, Stats.; third, an implied warranty under the provisions of sec. 1684*t*—13, Stats. The first of these has been disposed of adversely to the plaintiff by the jury in their answers to the second and third questions in the special verdict, the court charging them that they were to determine in these two questions whether defendants made any warranty by word of mouth, and that was to be determined by the evidence outside of what was contained in the bond, and that the effect of the bond upon the rights of the parties was a question for the court. These two questions, therefore, have no bearing upon the second and third ways stated above in which defendants could be bound by a warranty of title.

Under sec. 1684*t*—12 any affirmation of fact by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. The trial court evidently construed this undertaking as having no such statement of affirmation of fact as is specified in the preceding section of the statute. There is language from the undertaking considered as a whole from which it might reasonably be construed that the defendants positively asserted ownership of this cheese in themselves, viz. the recitals concerning "all persons interested in the ownership of said cheese" taken in connection with the pretty positive mark of identification as to who such persons were, shown from the conceded fact that the defendants got the full market and purchase price. If the allegations of the bond are indefinite or ambiguous, the fact of taking the purchase price, to which of course they had no shadow of right unless they had asserted some kind of ownership in the cheese, renders the language used a clear and definite assertion of owner-

ship sufficient to meet the call of the statute. The plaintiff testified that he relied upon defendants' warranty in making the purchase. The testimony, however, being indefinite and uncertain as to what particular form of express warranty was meant by plaintiff, and the jury having negatived the making of any oral warranty, we do not dispose of the case upon this phase of it.

By sub. (1), sec. 1684*t*—13, it is provided that in a contract of sale, unless a contrary intention appears, there is an implied warranty on the part of the seller that he has a right to sell the goods. By the third subdivision of the same section there is an implied warranty that the goods shall be free at the time of the sale from any charge or incumbrance in favor of any third person not declared or known to the buyer before or at the time when the sale is made.

The general rule is well established that there is an implied warranty of title in a sale of chattels in possession of the seller for a fair price where a contrary intention is not shown from the surrounding circumstances. *Edgerton v. Michels,* 66 Wis. 124, 131, 132, 26 N. W. 748, 28 N. W. 408; *Shores L. Co. v. Claney,* 102 Wis. 235, 239, 78 N. W. 451; 35 Cyc. 394. By sec. 1684*t*—13 no such condition of possession by the vendor at the time of sale is required, so that that does not affect the application of the rule of the statute and the decisions to this case.

Under the pleadings and testimony it is safe to assume that the agreement to sell was oral and was consummated by plaintiff paying the agreed price to defendants. There is nothing, therefore, shown as to the sale itself and nothing could be reasonably construed from the language of the bond indicating "a contrary intention" to the implied warranty of right to sell the goods fixed by sub. (1), sec. 1684*t*—13.

The bond in question is evidently not the agreement to sell itself, first, because it does not state the price nor the terms

of the sale, and second, because from its language it evidently refers to some other agreement for sale than any embodied in its own terms.

The defendants cannot be relieved from liability by the third subsection of sec. 1684*t*—13, quoted above, for it is manifest that the intent of the bond was for the very purpose of securing plaintiff against the claims of Bamford or the First National Bank, and it cannot, therefore, be construed as showing any "contrary intention" to the implied warranty.

That the condition of the bond was not drawn to meet the happening of the unexpected, namely, that the cheese would be taken by the bank without resorting to legal process, so that the action to be brought would have to be begun by plaintiff instead of defended by him, could not now make that document spell out a meaning which would be exactly contrary to its evident meaning at the time it was executed.

The allegations in the answer that defendants' attorneys informed plaintiff that he ought to bring replevin for the cheese, and that if they, defendants' attorneys, were permitted to carry on such action it would be without cost to plaintiff, and the testimony of defendants' attorney on the trial to the same effect, shows the practical construction put by the parties on the evident intent and meaning of the bond, viz. that it was to secure plaintiff against claims, in whatever form made, that were contrary to defendants' assertion of ownership.

The contract for the sale itself being separate and distinct from the bond, there is no room for the application of the rule in the cases relied upon by respondents that where there is a written contract of such sale with an express warranty, *other than such warranty as the law implies,* no other or different warranty can be proven by parol. *McQuaid v. Ross,* 77 Wis. 470, 473, 46 N. W. 892; *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 604, 63 N. W. 1013.

The question in this case really is whether plaintiff, when he paid the defendants full market price, purchased cheese

or a lawsuit. If he bought the cheese, there was by law an implied warranty of right to sell in the vendors; if it was intended by the parties that he was to purchase all the possibilities of a lawsuit, then the bond was inconsistent with such purpose. If the purpose of the bond was to limit the form of the lawsuit which defendants undertook to assume the care and expense of, then such limitation in no wise contradicts the implied warranty of title under the statute, and questions concerning the same could only come up if suit were brought upon the bond.

The uncontradicted evidence shows that the warehouse receipt given by plaintiff to the bank at the time of the taking possession of the warehouse was without consideration and in no wise altered the respective positions of the parties to this action, except as it might affect the right to bring a suit on the bond; but, that not being before us, the giving of the receipt is entirely immaterial.

Under the record, no proof having been offered by plaintiff to controvert the allegations of the answer of the defendant *Christie Walker* as administratrix of the estate of Frank Walker, no judgment could be entered against her, and as to her the action must be dismissed with costs, and, except as to her, plaintiff's motion for judgment should have been granted against the other defendants.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint as to the defendant *Christie Walker* and to enter judgment in favor of plaintiff against the other defendants for the amount claimed.

WINSLOW, C. J. (*dissenting*). I confess that I cannot understand the reasoning upon which the decision is based. To me the evidence tells a very plain and simple story. The parties on both sides knew that there was a dispute as to the title of this cheese and that the bank claimed to own it. The plaintiff had in fact gone so far as to acknowledge the bank's title by giving a warehouse receipt therefor to the bank when

he took possession of the storehouse. So when the parties met to negotiate for the sale there was no misapprehension about the situation; the plaintiff knew that the defendants claimed title as the original manufacturers of the cheese, and that the bank claimed title through Bamford, in whose hands the defendants had placed it.

The subject as to what remedy the plaintiff should have in case the defendants' claim of title proved invalid was discussed, and it was finally agreed that the defendants should give the bond or undertaking set forth in the statement of facts. Had this bond been signed by sureties there would be logical ground for the conclusion that it was given to increase the plaintiff's security, but it was not. It was signed only by the parties who claimed to own the cheese. These parties would all be liable for the value of the cheese on their implied warranty had nothing been said about security, and this liability would not depend on the successful results of an action of replevin or trover. The liability on the bond, therefore, is a limited liability, considerably more restricted though included in the liability resulting from implied warranty of title.

It is a familiar legal principle that the giving of express limited warranties excludes and negatives the idea that more comprehensive warranties were intended "and repels any implication of law to that effect." *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 63 N. W. 1013. Hence there was no implied warranty here, because the "contrary intention appears," and in such cases the statute in express terms declares that there is no implied warranty. Sec. 1684*t*—13, Stats.

Furthermore, in the present case the jury found that the defendants did not intend that there should be any warranty outside of the bond. Perhaps the defendants' contrary intention alone would not be a "contrary intention" within the meaning of the statute, but if a contrary intention on the part of both plaintiff and defendants was necessary it must be as-

sumed under the statute (in support of the judgment) that the court found a contrary intention on the part of the plaintiff as well, no question covering this subject having been proposed for submission to the jury by either party. Sec. 2858*m*, Stats.

So the result is that, even if it be held that the giving of the bond does not show the "contrary intention" required by the statute, but that such intention must be otherwise proven, in the present case it was otherwise proven and found by the verdict of the jury supplemented by the presumed finding of the court.

STATE EX REL. OWEN, Attorney General, Appellant, vs. STEVENSON and others, Respondents.

November 17, 1916—January 16, 1917.

Bridges over navigable streams: Construction by municipalities: Apportionment of cost: Appropriation by county: Mandamus: Approval of federal authorities: Location of bridge: Crossing of county lines: Eminent domain: Statute construed: Indefiniteness: Constitutional law: Legislative power: Delegation: Highway commission: Taxation: Taxes, by whom imposed: System of town and county government: Classification: Local legislative power: Uniformity in rule of taxation: Inequality in tax burdens: County board: Compelling performance of duty at special meeting.

1. The provisions of sec. 1321*a*, Stats. 1915 (relating to the construction of bridges over navigable streams), were enacted as part of the general policy to establish an efficient state highway system, and must be interpreted in the light of such legislative purpose.
2. The county clerk is a proper party to a proceeding by *mandamus* to compel the appropriation by the county board of the county's share of the cost of a bridge over a navigable stream.
3. Under sec. 1321*a*, Stats., as amended by ch. 418, Laws 1915, it is not essential that permission or approval of the war department of the United States be obtained before the taking of the required steps to provide for the construction and the payment

of the cost of a bridge over a navigable stream, or before a *mandamus* proceeding can be maintained to compel the proper appropriation therefor by a county board. But the highway commission must obtain such approval of the federal authorities before the construction of the bridge is begun, and should do so at an early stage of the proceeding.

4. Although a proposed bridge spanning the Wisconsin river between the village of Prairie du Sac, Sauk county, and the town of West Point, Columbia county, would extend over a portion of the river bed lying within the boundaries of Dane county, and a pier thereof would be constructed on an island lying in Dane county, such bridge is one within the calls of sec. 1321*a*, Stats. 1915, is located between the village and town named, and they are together to pay one third of its cost, the counties of Sauk and Columbia each one sixth, and the state one third. No part of such cost is chargeable to Dane county or to the town therein over which the bridge would extend.
5. The authority conferred upon municipalities to construct such a bridge necessarily implies that they may exercise the power of eminent domain for the acquisition of whatever land may be necessary for its construction and to connect it properly with the public highways.
6. Sec. 1321*a*, Stats. 1915, is not so indefinite and uncertain as to render it void.
7. The powers conferred upon the state highway commission by sec. 1321*a*, Stats. 1915, to find the fact as to the public necessity for a bridge at the place in question, to locate the same, to determine the character and kind of bridge adapted to the location, and to estimate the cost thereof, are not legislative powers, but are either purely administrative or *quasi*-executive in character and such as can properly be delegated to such a state agency.
8. In estimating the cost of such a bridge, which cost is to be paid by the state, the counties, and municipalities in prescribed proportions, the state highway commission does not impose a tax for the building of the bridge. The municipalities themselves, in voting to build the bridge, impose such tax; and the authority so to do may properly be given to them by the legislature.
9. The statute (sec. 1321*a*, Stats. 1915) does not violate sec. 23, art. IV, Const.—providing for "one system of town and county government, which shall be as nearly uniform as practicable,"—in that it authorizes only those cities, villages, and towns "bordering upon or through which any navigable or meandered stream runs" to build bridges, without granting other municipalities this power. Such a classification of municipalities is appropriate and within the legislative power.

10. Nor is the authority conferred upon those municipalities by the statute repugnant to sec. 22, art. IV, Const., providing for the conferring of local legislative and administrative powers on boards of supervisors.
11. Sec. 1321*a*, Stats. 1915, does not conflict with sec. 1, art. VIII, Const., providing that "the rule of taxation shall be uniform." The policy of the state in exerting the right of taxation for public improvements of this character cannot be limited or controlled by the benefits it may confer. If actual inequalities of tax burdens result from the statute, that is a matter for legislative consideration.
12. A writ of *mandamus* may be awarded commanding the members of a county board to proceed to perform a duty imposed upon them by law, either at a special meeting of the board or at the regular meeting or an adjournment thereof.

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

The attorney general petitioned the circuit court for Columbia county to issue a writ of *mandamus* to command the county clerk and the members of the county board of Columbia county to call a special meeting of such board pursuant to law to proceed to appropriate the amount of $12,000 in part payment of a bridge to be constructed across the Wisconsin river, to be raised by appropriation, by tax, or by bond as provided by statute.

It appears from the petition that the village of Prairie du Sac in Sauk county and the town of West Point in Columbia county have, pursuant to the statutes, held special meetings of their respective boards and decided to erect a bridge across the Wisconsin river to be located in the village and town. The state highway commission, upon notice of such action by the village and town, held a public hearing and decided that the bridge was necessary, that it would be 500 feet or more in length, prescribed the nature of the bridge, determined its location and the estimated cost thereof. The village of Prairie du Sac and the town of West Point thereafter duly held special elections to provide for the raising of their respective shares of the cost of such bridge and certified to

the state highway commission that such special elections had been held and the payment of their proportions of the cost provided for. The state highway commission certified to the county clerks of Columbia and Sauk counties that the amount to be paid by each county was $12,000, and to the state treasurer that the amount to be paid by the state was $24,000. The county board of Columbia county, after being notified of the action of the state highway commission by the county clerk, has refused to appropriate such amount or any part thereof.

The alternative writ of *mandamus* was issued by the circuit court and in due time the defendants filed their return thereto. The plaintiff entered a demurrer *ore tenus* to the return to the alternative writ. The circuit court ordered that the demurrer be overruled and the alternative writ of *mandamus* quashed. From such order this appeal is taken.

For the appellant there were briefs by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

Harlan B. Rogers, for the respondents.

SIEBECKER, J. This action is prosecuted by the attorney general on behalf of the people of the state to compel compliance by the authorities of Columbia county with the provisions of sec. 1321*a,* Stats., as amended by ch. 418, Laws 1915, for the construction of a bridge across the Wisconsin river located by the state highway commission in the town of West Point in Columbia county and the village of Prairie du Sac in Sauk county. Proceedings were taken by petition to the state highway commission by such town and village respectively under the provisions of this statute in September, 1915, asking for a hearing on the question of the construction of such a bridge. The proper procedural steps were taken by the commission for a hearing, and upon such hearing they found and determined that the bridge was a public

necessity and that it would be over 500 feet in length. The commission also fixed the location thereof and determined the character and kind of bridge adapted to the location, and the estimated cost thereof. The subsequent procedural steps required of the town and village and the highway commission under the statute for the construction of such bridge are shown by the petition. The county of Columbia by its authorized officers refuses to appropriate the money to pay its share of the cost of the bridge as fixed by the highway commission under the calls of the statute. The grounds upon which the parties rest their respective claims on the issues presented by this controversy omit due consideration of the change in the public policy of the state respecting the granting of state aid for the improvement of highways of the state. The constitutional amendment authorizing such state aid and the legislation on the subject clearly indicate that this policy, in addition to the financial aid that is being given by the state to promote this public function, includes the establishment of a state-wide system of highways and the creation of a state highway commission as a state agency to execute the power and perform the duties which the state has undertaken to exert directly in the execution of this governmental function. The provisions of sec. 1321*a*, Stats., were manifestly enacted as a part of the general policy to establish an efficient state highway system, and must be interpreted in the light of such legislative purpose.

The county's refusal to appropriate the amount certified by the state highway commission as its share of the cost of the bridge is based on different grounds, which we will consider separately.

(1) It is contended that the writ issued to compel the county authorities to proceed in the matter must be quashed as to *H. Roy Tongen,* the county clerk of Columbia county, because he is not guilty of any default or breach of duty in the matter. It is apparent that he has taken no action and

it may be necessary for him to act in order to have the proper action taken by the county board. This makes him a proper party to the proceeding.

(2) The point is made that no *mandamus* can issue until a permit to build such bridge has been obtained from the war department. The present statute, as amended in 1915, omits the provision of the former statute that ". . . the location and construction of such bridge shall be approved by the war department of the United States." The legislature by such amendment evidently intended that it should not be necessary to obtain such permit before the taking of the required steps by the municipalities, highway commission, and the counties to make provision for the construction and the payment of the cost of the bridge as required by the former statute. See *State ex rel. West Point v. Price,* 158 Wis. 312, 148 N. W. 873. The federal statute (30 U. S. Stats. at Large, 1151, ch. 425, sec. 9; 4 U. S. Comp. Stats. 1913, sec. 9971) contains the following regulations regarding the construction of this bridge:

". . . such structures may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the chief of engineers and by the secretary of war before the construction is commenced. . . ."

It is clear that the state and federal statutes do not require permission and approval by the federal government for construction of this bridge before the procedural steps providing for the construction and for the payment of the bridge have been taken. Since the state legislature has authorized the construction of the bridge, it devolves on the state highway commission to obtain the approval of the federal authorities of the location and of the plans of the bridge before construction is commenced. Although this can be done at any time before construction is commenced, it would seem most desir-

able that such approval be obtained at an early stage of this proceeding to avoid the taking of any further step on the part of all interested parties in case such approval is refused. Manifestly neither party could be required to expend any of the money appropriated for the construction of the bridge before its construction is approved by the federal authorities.

(3) It is strenuously insisted that the bridge as located and placed does not come within the calls of the provisions of sec. 1321*a*, Stats. The trial court held that the bridge has been in fact located within the counties of Dane, Columbia, and Sauk and hence is not such a bridge as this statute contemplates. The claim is that the provision of sub. 6, sec. 1321*a*, Stats., providing for the apportioning of the cost of bridges authorized by this act, expressly excludes this bridge. This subsection provides:

"Whenever such municipality or municipalities shall have previously voted the issue of its bonds for the purpose of constructing any such bridge . . . , *the said municipality or municipalities, the county or counties in which they are located, and the state shall pay for the construction of such bridges as follows:* . . .

"(a) Where such bridge is located wholly within one municipality or is constructed by a municipality alone, such municipality shall pay one third the cost thereof. . . .

"(b) When such bridge is located between two municipalities and is constructed by them jointly, then . . ." they shall together pay one third of the cost in the proportion specified.

"(c) The county shall in all other cases pay one third of the cost, except when such bridge is located on or across the line between two counties and in that case each county shall pay one sixth of such cost.

"(d) The state shall in all cases pay one third of the cost of constructing such bridge."

It is obvious from the provisions of (a), (b), and (d) that the municipalities are to pay one third and the state one third of the cost of the bridge. There then remains one third

of the cost to be paid by the proper county or counties included in the statute. It is argued that it appears in the record before us that this is a bridge in the town of West Point, Columbia county, the town of Roxbury, Dane county, and the village of Prairie du Sac, Sauk county, and hence is not a bridge located between the town of West Point and the village of Prairie du Sac so as to be within the provisions of sec. 1321*a*, Stats. The bridge, according to the maps and plats shown in the record, spans the Wisconsin river between the two municipalities, the town of West Point and the village of Prairie du Sac. In spanning the area of the river bed between these two points it extends over a portion of the river bed which lies within the boundaries of Dane county. The bridge, however, does not abut on any part of Dane county, nor do any highways of Dane county traverse the river bed which is spanned by this bridge. The only contact any part of the bridge can have with the area lying in Dane county is by locating piers to support the bridge in the river bed or on an island of the river. According to the plans, such a pier is to be constructed on an island in the river bed. Does the fact that such pier of the bridge is located within the river bed lying in Dane county locate the bridge in Dane county within the contemplation of the provisions of this section of the statutes? The provisions of this statute providing for the construction of such a bridge clearly indicate that the territory of the municipalities connected by the bridge is deemed to be the place of location of the bridge and therefore impose the burden of part of the costs of construction and all costs of maintenance on them. Furthermore, it seems a speculative notion to say that the location of a pier of the bridge within the river bed determines the location of the bridge. It is more reasonable to say that its location is within the municipalities where the two ends connect with public highways. In a practical sense, and we think in the statutory sense, this bridge is located in the two municipalities it con-

nects on the opposite sides of the river, namely, in the town of West Point and the village of Prairie du Sac. Such location determines which municipalities and counties must bear the burden of its cost, as provided by the statute, and eliminates the "town of Roxbury" as one of the municipalities connected by the bridge. Therefore such "town of Roxbury" is not chargeable with any part of the cost of the bridge. This interpretation of the statute makes its provisions a complete and practical scheme and effectuates the purpose of the legislature.

It is argued that the municipalities constructing this bridge cannot take the property in the river bed and island therein for this public purpose. This statute being one of the many statutes providing for the construction and maintenance of the highways of the state, it seems a reasonable inference that the legislature intended that the authority conferred on municipalities to construct such a bridge within their borders under the supervision of the highway commission necessarily implies that such municipalities may exercise the power of eminent domain conferred on them to acquire land for this public purpose. If the necessity arises, the power of condemnation may be resorted to for the acquisition of whatever land may be necessary to construct and erect this bridge and properly connect it with the public highways. *Schneider v. Menasha,* 118 Wis. 298, 95 N. W. 94; *Bloomer v. Bloomer,* 128 Wis. 297, 107 N. W. 974. It necessarily follows from this consideration that this bridge is one within the calls of the statute; that the statute is not so indefinite and uncertain as to render it void; and that the cost of the bridge is to be apportioned under the statute as follows: one sixth to be paid by the town of West Point; one sixth by the village of Prairie du Sac; one sixth by the county of Columbia; one sixth by the county of Sauk; and one third by the state.

(4) It is asserted that the statute improperly confers legislative powers on the state highway commission. Stress is

placed on the claim that the powers conferred, authorizing the commission to find the fact of the public necessity for a bridge at the place in question, to locate the same, to determine the character and kind of bridge adapted to the location, and to estimate the cost thereof, are legislative powers which cannot be delegated. It is manifest that all of these duties are either purely administrative or *quasi*-executive in character and nature. Under repeated decisions of this court such duties can properly be delegated to appropriate state agencies. See *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905; *Milwaukee v. Railroad Comm.* 162 Wis. 127, 155 N. W. 948; *Chippewa & Flambeau Imp. Co. v. Railroad Comm., ante,* p. 105, 159 N. W. 739.

(5) It is contended that the highway commission determines and imposes the amount of tax for defraying the cost of this public improvement, because it is required to "estimate the cost thereof" and what amount is to be paid by the state, counties, and municipalities in the prescribed proportions. True, the commission acts for the state to "estimate the cost" of any such bridge, and the legislature by law declares such estimate shall be the amount the bridge is to cost and that the amount is to be charged to the municipalities, the counties, and the state in the event the municipalities by vote determine to build the bridge. The result of this is that the tax for such improvement is imposed by the municipalities empowered to build the bridge. This can properly be done by the legislature. As declared in *State ex rel. Carey v. Ballard,* 158 Wis. 251, 148 N. W. 1090: "The town as an integral part of the county can appropriately be selected as the representative of all the people of the county for the purpose of determining the desirability, necessity, and amount of the tax to be paid in the county for this public improvement." The right of the municipalities to vote on the question of building the bridge and to reject the same involves a

determination of the question whether or not this public improvement shall be made and the amount of tax that is to be imposed.

(6) The act is assailed as violating the constitutional provision providing for "one system of town and county government, which shall be as nearly uniform as practicable" (art. IV, sec. 23), in that it authorizes only those cities, villages, and towns "bordering upon or through which any navigable or meandered stream runs" to build bridges, without granting other municipalities any such power. This is said to constitute arbitrary and unreasonable classification of municipalities. It is difficult to perceive anything unreasonable in the scheme of imposing on such municipalities the governmental burden of providing and maintaining a part of the highways of the state. This has been the approved and necessary method of the state in performing this governmental function. *State ex rel. Baraboo v. Sauk Co.* 70 Wis. 485, 36 N. W. 396; *Bloomer v. Bloomer,* 128 Wis. 297, 107 N. W. 974; *Rinder v. Madison,* 163 Wis. 525, 158 N. W. 302. These and many other cases in this court have approved the classification of municipalities, on the grounds upon which this act proceeds, as appropriate and within the legislative power. From this it also follows that the respondents' contention that the authority conferred on these municipalities by this act is repugnant to the provision of sec. 22 of art. IV of the state constitution, providing for the conferring of local legislative and administrative powers on boards of supervisors, is without merit.

(7) The point is made that the provisions of sec. 1321*a*, Stats., are in conflict with the provisions of sec. 1 of art. VIII of the constitution, prescribing that "The rule of taxation shall be uniform, . . ." The argument is made that the people of Dane county who are benefited by the bridge are exempt from taxation for its construction and maintenance and that the residents of the cities of Portage and Columbus

plaintiff association pursuant to the authority granted by sec. 2014—14, Stats. 1915, providing that

"Should the commissioner of banking find any such association conducting its business contrary to law he shall notify its board of directors in writing of the fact, and if, after thirty days, such illegal practice continues he may take possession of said association and liquidate the same in the manner provided in respect to state banks by section 2022 of the statutes. Should he find that the affairs of any such association are in an unsound condition and that the interests of the public demand the dissolution thereof and the winding up of its business he shall take possession of said association and liquidate the same in the manner provided in respect to state banks by section 2022 of the statutes."

Defendant claims that plaintiff in the distribution of its contingent fund has violated the provisions of sec. 2014—10, Stats. 1915, and therefore he is authorized to take possession of its business. Plaintiff has issued stock in series and has kept a contingent fund account separate as to each series of stock, and in retiring a matured series it paid the stockholders the net amount of the contingent fund account of that series. The defendant claims that only one contingent fund account should be kept and that the fund must be kept intact and cannot be apportioned and paid on the stock of a matured series. The question raised involves a consideration of sec. 2014—10, which reads as follows:

"Quarterly, semiannually, or annually, as may be specified in the by-laws, the gross earnings of the association shall be ascertained, from which shall first be deducted the expenses of the association, and from the balance shall be set aside the fund for the payment of contingent losses hereinafter provided for. The balance of the profits shall be declared as a dividend; the proportionate amounts may be placed to the credit of holders of instalment stock, and holders of paid-up stock may receive their dividend in cash; provided, that if at the time of such dividend period there be not a sufficient amount in the contingent fund for the payment of losses then existing, no dividend shall be declared and no dividend shall

be apportioned or credited on instalment stock and no dividend shall be apportioned, credited or paid on paid-up stock until all losses have been fully paid. Before any dividend shall be declared, credited or paid, at least five per cent. of the net profits shall be set aside as a fund for the payment of contingent losses, until such fund reaches at least five per cent. of the outstanding loans. All losses shall be paid out of such fund until the same is exhausted, and whenever said fund falls below five per cent. of the loans aforesaid it shall be replenished by regular appropriations of at least five per cent. of the net earnings, as hereinbefore provided, until it again reaches said amount. At the close of each fiscal year, and at such other time as the commissioner of banking may direct or the board of directors may determine, it shall be the duty of the president to appoint a committee of five, three of whom shall be members of the board of directors, and two shall be stockholders, not directors, the duty of which committee shall be to schedule the assets of the association, fix their value and determine any losses which may have been sustained, and make a report of all their findings to the board of directors. It shall thereupon be the duty of the board of directors to charge off all losses so reported, and if there be not a sufficient amount in the contingent fund and the net profits for the period for the payment of such losses, then such losses, or the balance unpaid, shall be apportioned according to the number of all shares outstanding, whether instalment or paid-up stock, and the proportionate amount shall be charged to each member."

All the facts sufficient to raise the question at issue appearing from the complaint, the defendant entered a general demurrer thereto, which was sustained, and the plaintiff appealed.

For the appellant there was a brief by *Lenicheck, Robinson & Boesel,* and oral argument by *F. J. Lenicheck.*

The *Attorney General* and *E. E. Brossard,* assistant attorney general, for the respondent.

VINJE, J. It is evident from the language of sec. 2014—10 that in terms it provides for but one contingent fund for

each association to be created and maintained as therein provided. At the time of its enactment the legislature was familiar with the plan of such associations issuing stock in series. This is evidenced by the fact that sec. 9, ch. 368, Laws 1897, the general act regulating these associations, provides that "When the stock in any series shall have reached its matured value, . . . the holder of unpledged shares in such series shall be paid out of the funds of the association the matured value thereof." And under the law as it then existed such matured stock shared in its proportion of the contingent fund, for sec. 16 thereof provided that "All shares, at their maturity, shall be entitled to receive such share of said reserve fund as the directors may determine, in addition to the amount mentioned in section 9, hereof." The above provision was omitted in the amendment made to sec. 2014—10 by ch. 156, Laws 1899, and has not been re-enacted, though an attempt to do so was made by senate bill No. 252 for 1915, which failed of passage. The bill read:

"Provided that when the capital stock of the association shall be issued in successive series and all the business and affairs of each series are kept separately and all the expenses of the association shall be fully paid and there shall be no losses then existing, the directors upon the maturity of any series shall set aside from the remaining contingent fund the net proportionate share of the same contributed by the shareholders of stock in the matured series and credit and pay the same to the holders of such matured stock."

It will thus be seen that the legislature considered that the matured value of serial stock did not include a share of the reserve or contingent fund because it made separate provision for the distribution of such share; that in amending the law of 1899 the provision for the distribution of such share was omitted, and that in 1915 it refused to re-enact it.

The history of the legislation on the subject, taken in connection with the plain language of the statute, providing for but one contingent fund for each association, the manifest

object of a contingent fund, and the required extent thereof leave no doubt as to the legislative intent that there should be but one contingent fund. Were such a fund to be kept separate for each series of stock and distributed at its maturity, it could never reach five per cent. of the outstanding loans as contemplated by the statute. The banking department has correctly construed the provisions of the law, and the demurrer to the complaint was properly sustained.

By the Court.—Order affirmed.

WISCONSIN BRICK COMPANY vs. NATIONAL SURETY COMPANY, Respondent, and another, Appellant.

December 5, 1916—January 16, 1917.

Mechanics' liens: State buildings: Bond for payment of claims: Carriers: Freight charges on materials.

1. Government buildings are exempt from the operation of the mechanic's lien statute.
2. Sec. 3327*a*, Stats.,—requiring a bond to be given for the payment of all claims "for work or labor performed, and material furnished in and about" the erection of any building for the state,—was not intended to give a remedy more extensive than that given by the mechanic's lien statute, nor to give a remedy to any different classes of persons.
3. A common carrier which, in the exercise of its ordinary functions, transports building material consigned by others to the principal contractor for a private building, is not entitled, under sec. 3315, Stats., to a lien on such building for the freight charges; nor does the bond required by sec. 3327*a* cover such charges in the case of a state building.

APPEAL from a judgment of the circuit court for Dane county: JAMES WICKHAM, Judge. *Affirmed.*

The action is brought to recover upon two bonds given pursuant to sec. 3327*a*, Stats., to the board of regents of the University of Wisconsin by the firm of W. H. Grady &

Company as principals and the *National Surety Company* as surety to insure the carrying out of two contracts by said firm to erect two buildings for the University. The bonds were each conditioned for the payment by the contractor of "all of the claims for work or labor performed and materials furnished in and about the erection or construction of such building to each and every person entitled thereto." The firm of Grady & Company defaulted on their contract and went into bankruptcy and the regents took possession of the material and machinery on the ground and completed the building. Grady & Company were largely indebted to subcontractors and materialmen, and the Wisconsin Brick Company brought this action on the bond against the surety company alone to recover for brick furnished to Grady and Company for the buildings. Upon petition, all laborers and materialmen having unpaid claims against Grady & Company for work or material on the two buildings were joined as parties defendant and directed to file their claims. Trial by jury was waived and the issues arising on the various claims were tried by the court. The appellant, *Chicago, Milwaukee & St. Paul Railway Company,* filed its claim by way of cross-complaint against the surety company to recover the sum of $838.35 for freight charges on materials transported by it over its railroad, which materials were admittedly used in the construction of the buildings. The materials aforesaid consisted principally of sand and gravel and were delivered to Grady & Company upon the premises at the immediate point where they were required for use, upon a temporary sidetrack which the railway company had constructed for the purpose. The facts were undisputed, but the trial court concluded that no part of the claim was "for work or labor performed or materials furnished in or about the erection or construction" of either of the buildings, and dismissed the claim. From this judgment the railway company appeals.

For the appellant there was a brief by *Sanborn & Blake,*

attorneys, and *C. H. Van Alstine* and *H. J. Killilea,* of counsel, and oral argument by *C. E. Blake.*

For the respondent there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *W. C. Owen.*

WINSLOW, C. J. The question presented is not free from difficulty, but we think the trial court reached the correct conclusion.

The bonds in question were given pursuant to sec. 3327*a,* Stats. This section provides in substance that all contracts for the building of buildings for the state shall contain a provision "for the payment by the contractor of all claims for labor and material," and further that no such contract shall be let unless a sufficient bond be given for the faithful performance of the contract "and the payment of all the claims for work or labor performed, and material furnished in and about the erection, construction, . . . of such building to each and every person entitled thereto."

This section was first passed in 1899 (ch. 292, Laws 1899) and took its place in ch. 143 of the Statutes treating of the subject of liens in Sanborn & Sanborn's Supplement to the Wisconsin Statutes published in 1906. It has retained its place in that chapter in all the editions of the general statutes published since that time.

It is quite apparent that it was passed in order that materialmen and laborers employed upon state buildings should not be remediless in case of bankruptcy of the principal contractor. It was well understood that there could be no mechanic's lien on a government building. *Wilkinson v. Hoffman,* 61 Wis. 637, 21 N. W. 816. It was felt that materialmen and laborers on such buildings were as much entitled to protection as those who furnished materials or labor in the construction of a building owned by private parties. While this is the plain intention of the act, there is no indication that it was intended to give any more extensive remedy than that furnished by the mechanic's lien law nor to give a

remedy to any different classes of persons, but rather there is every indication that the remedy was intended to be co-extensive with the mechanic's lien remedy.

The clearest indication of this intent is to be found in the fact that the wording of the contract and the bond as laid down by the statute is to all intents and purposes identical with the wording of that part of the mechanic's lien statute which gives a lien to materialmen and laborers who perform work or furnish materials in the erection of a private building. The inclusion of the section in the chapter on liens in the Statutes in immediate connection with the section relating to mechanics' liens in every authorized edition of the Statutes is another very convincing indication of the legislative thought. Identical words in the two statutes should doubtless receive identical construction. If there would be no mechanic's lien here were the building owned by private parties, there ought to be no liability on the bond.

We are not referred to any authority which holds a common carrier entitled to a mechanic's lien for freight charges on material used in the work. It is true that it has been frequently held that where freight charges are really or in substance a part of the purchase price of materials they can properly be allowed to the materialman. *Barker & Stewart L. Co. v. Marathon P. M. Co.* 146 Wis. 12, 130 N. W. 866; *Brace & Hergert M. Co. v. Burbank,* 87 Wash. 356, 151 Pac. 803. It has also been held that where one under contract with the owner or principal contractor hauls material for the construction or repair of a building he is entitled to a lien therefor. *Hill v. Newman,* 38 Pa. St. 151; *Kehoe v. Hansen,* 8 S. Dak. 198, 65 N. W. 1075; *Hill v. Twin Falls S. R. L. & W. Co.* 22 Idaho, 274, 125 Pac. 204; *McClain v. Hutton,* 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; *Davis v. Mial,* 86 N. J. Law, 167, 90 Atl. 315; *Fowler v. Pompelly,* 25 Ky. Law Rep. 615, 76 S. W. 173. In the present case there was no contract between either the state or Grady & Company and the railway company. The company in the ex-

ercise of its ordinary functions as a common carrier received at a distant station sand shipped by various persons and consigned to the contractor, and transported the same to Madison and placed the cars containing it on the temporary sidetrack aforesaid. It unquestionably had a carrier's common-law lien thereon for its freight charges (*Warehouse & B. S. Co. v. Galvin,* 96 Wis. 523, 71 N. W. 804), but it waived that lien by allowing the contractor to take possession of it without prepayment of the freight charges. Would it be entitled to a lien on the building if it had been owned by private persons? We think not. The lien law was doubtless intended to give a lien to those who otherwise would have no security, not to give an additional lien to a party who was amply secured before.

The sand and gravel must necessarily have been taken from the cars by the contractors' employees in barrows or other appliances and moved to the concrete mixer or mortar bed notwithstanding the cars were placed on the sidetrack near the building. Had the cars been sidetracked in the yards of the company the situation would have been logically the same; in that case the sand and gravel would have been unloaded in the yard by the contractors' employees and transported by wagon to the same mixer or mortar bed. The carriage of the material by the railway company would have been just as truly work and labor "in and about the erection or construction of the building" in the latter case as in the case before us. Such a construction of the statute would open a broad door for the enforcement of liens on buildings by common carriers for freight charges on building materials which are to be used in such buildings. We do not feel that it was intended that there should be any such open door. If we are wrong in our construction of the legislative intention, our error can be readily and easily corrected by the legislature itself.

By the Court.—Judgment affirmed.

ESTATE OF SIMONSON: SIMONSON, Respondent, vs. BERGUM, Administrator, Appellant.

December 5, 1916—January 16, 1917.

Husband and wife: Obligation of husband: Employment by wife before and after marriage: Right to compensation: Evidence: Claim for money advanced.

1. The law requires the husband to support and provide for his wife, and he cannot shirk such requirement even by an express contract with her.
2. Evidence which would be sufficient to support a finding of a contract between a man and woman for services and compensation before they were married would not necessarily be sufficient to support a finding that such a contract was made after their marriage.
3. A wife may lawfully employ her husband as agent or servant in the management of her separate property; but where such contract would necessarily include much which the husband is required by law to do for his wife without compensation there should be, to entitle him to compensation, a very substantial showing of such an agreement.
4. The evidence in this case is *held* insufficient to support a finding that there was an express contract of employment between husband and wife, before their marriage, sufficiently definite as to the compensation he was to receive so that it can now be enforced by him against her estate.
5. It appearing that, whatever the agreement as to compensation was, the parties thereto afterwards made a settlement or adjustment of their differences, there can be no finding of an implied contract that the husband was to receive the reasonable value of his services.
6. The evidence is also *held* insufficient to show the making of a new contract, after marriage, that the services of the husband were to be compensated as if he were still a hired man.
7. The husband in such case having asserted, before and during the marriage and after the wife's death, the right to possession of certain personal property on the ground that he advanced the money for its purchase, and having, both before and after the wife's death, disposed of some of such property for his own benefit, he cannot recover from the wife's estate the money so advanced.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from a judgment in favor of *Ed. Simonson* as claimant against the estate of said deceased.

In 1903 the deceased, Martha Simonson, then the widow of Peter Olson, who died intestate, with her children occupied a farm of about 200 acres in Columbia county theretofore owned by said Olson. About forty acres were under cultivation and twenty-five acres in hay and pasture. Tobacco, corn, oats, and potatoes were raised, milch cows, sheep, and hogs were kept, and two or three horses were used. In April, 1903, the claimant, *Ed. Simonson,* went to work on the farm and assisted in taking care of the same until 1914. During a part of the period a son of the deceased, Martin, helped to some extent. At the time the claimant went there he had $400, which was expended in buying horses and harnesses and machinery, and the personal property so purchased was used on the farm during the eleven succeeding years. The deceased handled practically all the money from the sale of the products of the farm and, under the testimony, paid the claimant not to exceed $25 per year. The two were married in May, 1907, and lived together as husband and wife until the spring of 1914. At that time the deceased left and started a divorce proceeding which was not disposed of at the time of her death in December, 1914.

The claimant testified that he expected to be paid the same as a hired man during all these years both before and after marriage and expected the $400 back that he had advanced for the purchase of personal property. After the deceased left the farm in the spring of 1914 the claimant sold some of the cattle, hogs, and sheep for about $325 and retained the money, and after the appraisal of the estate of the deceased *Simonson* claimed the machinery as against the estate and took the horses away from the administrator and sold

them and kept the money and gave away the harnesses. He testified that the two horses and two colts taken by him were worth about $200.

The claimant demanded from the estate a yearly salary of $400, starting in 1903 and running to and including 1913, upon which was allowed an annual credit of $25, and also the $400 claimed to have been advanced in 1903, making a total of his claim of $4,675 without computing interest. In the hearing in the county court the claim was entirely disallowed.

On appeal to the circuit court the case was submitted to the jury. They rendered a general verdict in favor of claimant for $1,215.24, upon which judgment was rendered in favor of the claimant, and from which judgment appeal is taken to this court.

The cause was submitted for the appellant on the brief of *Nelson & Bushnell,* and for the respondent on that of *Henry A. Gunderson.*

ESCHWEILER, J. The claimant in this case relies upon testimony in the nature of admissions made by the deceased as a support for the verdict in his favor. One Ferdinand Voth, a former sheriff and a justice of the peace, testified that early in 1907 the deceased came to him as such justice of the peace with a complaint against *Simonson.* That the two came into court and something was said between them about their property rights, about the money brought to the farm and as to the salary earned while on the farm. After a conference they settled their differences. In response to inquiries from the witness the deceased said she owed *Simonson* money and wanted to pay it, and she produced $80. Claimant said he would not take it, he wanted the $500, and that deceased then said she owed him $500 and would pay him later; that he did not remember anything being said about wages, but that it was said that *Simonson* had the $500

when he came there. That they came back in May, 1907, and were married by this justice. That she then repeated the same thing about *Simonson* being paid for his work and that they had gotten the money matters fixed up.

One Ulverstadt was present at the interview between the parties at the same time with Mr. Voth. His recollection of the conversation was that there had been trouble between them and deceased wanted *Simonson* to leave the place. *Simonson* said he would if he could have his money. She presented $80 which he refused, saying he wanted $500 for his work and that he was going to claim some horses. She then said that, not having money enough, she supposed whatever she had to pay she would pay, that he would get his pay after she was gone. Subsequent to the marriage Ulverstadt had conversations with the deceased in which she sometimes said *Simonson* did not have anything coming, and sometimes that he ought to have some pay for his work.

A son of the deceased, Martin Olson, who was twenty-one at the time of the trial, was called as a witness on behalf of the claimant and testified that he did not hear his mother say anything about how *Simonson* should be paid and that he never heard his mother say that *Simonson* brought money to the farm when he came there. It appeared, however, that in February, 1915, a year before the trial, he came to the office of claimant's attorney and was questioned and the questions and answers taken down in shorthand and written out and the same received in evidence at the trial, and that at the same time he made an affidavit; the substance of the examination and affidavit being that he knew *Simonson* had been a good, faithful worker on the farm during the eleven years and that everything he had earned during the time had gone into the place, and that he, Martin, had frequently heard his mother tell *Simonson* that he, *Simonson,* would get pay for all his work that he did there, and the money he spent there,

out of the property of the estate after she was dead; that he, Martin, thought *Simonson's* services were reasonably worth $300 per year besides the little clothing and spending money he received while there. Thus his testimony is contradictory, indefinite, and of very little value.

The only testimony that can be considered in the nature of indicating any express agreement between the claimant and the deceased was that given by Voth and Ulverstadt, and the principal part of that related to a time prior to the marriage and is also very indefinite.

It appears furthermore that the farm so occupied by the parties belonged to the children of the deceased Peter Olson, and was not, therefore, the estate of the deceased except as to her dower and homestead rights and any interest secured by the mortgage of $2,000 she held against the farm.

Upon the assuming of the relationship of husband and wife the law requires the husband to support and provide for his wife, such requirement being grounded upon principles of public policy, and the husband cannot shirk it even by an express contract with his wife. *Rowell v. Barber,* 142 Wis. 304, 318, 125 N. W. 937; *Ryan v. Dockery,* 134 Wis. 431, 114 N. W. 820; *Perkinson v. Clarke,* 135 Wis. 584, 591, 116 N. W. 229.

Manifestly the moment the marital relation is assumed the position of the parties in matters of this kind becomes substantially different from that existing prior thereto, and what might be considered sufficient to support a finding of a contract between the two for services and compensation therefor before marriage would not necessarily be sufficient to support a finding of such a contract subsequent to marriage.

While it is true that the wife may lawfully employ her husband as agent or servant in the management of her separate property, yet where, as here, such contract would necessarily include so much of that which the husband is required

by law to do for his wife without compensation, there ought to be a very substantial showing of any such agreement subsequent to marriage.

We are satisfied, therefore, from the entire testimony and the surrounding circumstances, that there is not enough in the record to support a finding that there was an express agreement sufficiently definite so that it can be now enforced between these parties prior to the marriage as to what that compensation should be. Furthermore, it appears that at this conference they made some settlement or adjustment of their differences, but what that new contract of settlement was does not appear. This showing that there was an express contract between them takes away any basis for a finding on the theory of an implied contract to pay the reasonable value of such services, for this would be to make a new contract for them.

We are also satisfied that there is a want of sufficient evidence in the record to establish the making of a new contract after marriage between them that the services of the husband were to be compensated as though he were still a hired man, and this especially so as to services rendered in the improvement of and on the farm of his stepchildren, who were then incapacitated from making any such a contract.

It appears that claimant did invest or loan to deceased to be invested in personal property $400 when he went there in 1903. It further appears, however, from claimant's own testimony that he asserted the right to take possession of certain of the personal property on the theory and claim that it was his by reason of his having advanced the money to purchase the same. This assertion was made before the marriage in 1907, during the marriage, and finally, after his wife's death, when he took some of the horses away from the administrator of the estate. He disposed of some of this property before and after his wife's death and pocketed the

proceeds. This position so taken is the exact opposite of that he is now forced to take in order to be reimbursed for this amount from the estate. He cannot be permitted to occupy the two positions, and his claim based upon the $400 used in 1903 must also be disallowed.

By the Court.—The judgment of the circuit court is reversed, and the action remanded to the circuit court with directions to affirm the judgment of the county court.

FICKS and others, Respondents, vs. PURCELL, Appellant.

December 5, 1916—January 16, 1917.

Reformation of instruments: Mistake: Evidence: Sufficiency: Estoppel: Waiver.

1. In an action to reform a contract by which defendant sold to plaintiffs his interest in a partnership between him and one of them, a finding of the trial court that the consideration for such sale was to be the amount defendant had actually invested in the business, and that through a mutual mistake of fact such amount was overstated, is *held* to be sustained by the evidence.
2. Payments made by plaintiffs to the defendant after their discovery of the mistake did not, under the circumstances of the case, operate as an estoppel or waiver of the right of defendant's former partner to recover the amount overpaid.
3. A further finding in such case that a note for $500 given by defendant to his former partner was given as security for the bad debts of the partnership and not as a reduction of the amount paid to defendant for his interest, is also *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment decreeing the reformation of a certain contract between the parties and that the plaintiff *Ficks* recover of the defendant the sum of $1,000.

The plaintiff *Ficks* and defendant in September, 1910, entered into partnership, the agreement providing that the defendant was to furnish the capital needed, not in excess of $5,000, and that if at the end of the first year both parties so desired, each should become the owner of an undivided one-half interest in the business and property by an agreement to be made at that time, but that if it were not satisfactory then the defendant should have the right to withdraw the amount originally invested, with interest at five per cent. in so far as the assets were sufficient to do that.

They entered upon that business and conducted it for about a year, at which time the defendant became desirous of disposing of the business, and finally the plaintiff *Ficks* secured the plaintiffs *Barnard* and *Webster* to join with him in taking over the said business, and the four then made a written contract dated September 18, 1911. This new agreement recited the former partnership and the desire of the plaintiffs to take the same over and form a corporation to carry it on. The contract as first drafted contained a recital that the said defendant has an "investment" of $7,000 in said partnership, and has also become personally liable for certain bank loans made to the partnership for the conduct of the business. At the time of the signing of the agreement the word "investment" was stricken out and the word "interest" inserted, apparently by the plaintiff *Webster*. The contract provided for the method in which the payments to defendant were to be made, part in cash, the rest in notes, the last payment being made about a year after the making of this second contract.

At the time of the making of the second contract it was supposed that the indebtedness to the bank covered by the notes was $5,500. It was also understood by all the parties that the entire amount invested, including loans, was $14,500, of which it was undisputed the plaintiff *Ficks* had advanced

$2,000, and, on the assumption that the indebtedness of the bank was $5,500, this would have made the investment of defendant the $7,000 mentioned in the contract.

Immediately after the closing of the deal between the four parties it was ascertained that the indebtedness covered by the notes to the bank was $6,500 instead of $5,500, and that larger amount was paid by the new corporation. There was some conversation then between the parties with reference to this condition, and plaintiffs testified that it was suggested that the matter should be left for further examination, and that if it should then appear that defendant had been overpaid he would repay. There was also testimony of a conversation between plaintiff *Ficks* and defendant to the effect that there were obligations due the former copartnership which in all probability would not be paid and that *Ficks* desired to be secured to the amount of $500 by defendant, as *Ficks* had guaranteed the payment of such debts to the new company. The defendant executed his note at the time of the closing of the deal to the plaintiff *Ficks* for $500 and subsequently paid the same. There were such unpaid debts due the old copartnership. It appeared that during the first year of the business the books of account were not very accurately kept. Loans had been made at various times during the first year evidenced by notes given to the banks, some of which were renewed from time to time by the giving of new notes.

The defendant testified to the effect that he sold whatever interest he had in the business to the plaintiffs for the $7,000 and that there was no understanding or agreement that it was meant by the reference to the $7,000 in the contract to measure the interest that he then actually had in the business or that he was to receive back merely his actual investment, and that his note of $500 to *Ficks* was by reason of an understanding that he was to receive, so far as he and *Ficks*

were concerned, only $6,500 instead of $7,000 for the sale of his interest in the business.

For the appellant there was a brief by *Gilbert & Ela,* and oral argument by *F. L. Gilbert* and *Emerson Ela.*

For the respondents there was a brief by *Olin, Butler, Stebbins & Stroud,* and oral argument by *Ray M. Stroud* and *Harry L. Butler.*

ESCHWEILER, J. The disputes between the parties in this litigation are as to matters of fact only, that is, whether or not at the time of the agreement in October, 1911, the defendant was selling whatever interest he might have in the business for the lump sum of $7,000, or whether it was understood and agreed between the parties that he was to receive back whatever investment he might have made, and that that was but $6,000 instead of $7,000; and secondly, whether the $500 note made by defendant to the plaintiff *Ficks* was as security for the bad debts of the former copartnership, or whether it was, as defendant claimed, the deduction in the purchase price from $7,000 to $6,500. Defendant further contends that the payments to him by plaintiffs subsequent to their discovery of the mistake as to the obligations to the bank amount to an estoppel or waiver of any present right to recover.

No useful purpose would be served by a lengthy discussion of the evidence. From an examination of the record we are satisfied that there is support therein for the several findings of the court below and that the court was justified in holding that there was a mutual mistake as to the amount actually invested by defendant, even though any mistake be denied by the defendant.

Under the circumstances disclosed the plaintiff *Ficks,* who alone recovers the $1,000, is not barred by any principle of estoppel or waiver from recovering the amount of the overpayment.

There was a dispute between the parties as to the object and purpose in giving the $500 note by defendant to *Ficks,* and in that dispute the court found in favor of the plaintiff, and under the familiar rule that governs under such circumstances that finding must also stand.

By the Court.—The judgment of the circuit court is affirmed.

KRAHN and another, Respondents, vs. GOODRICH, Appellant.

December 5, 1916—January 16, 1917.

Appeal: Review: Findings of fact by trial court: Value of land: Conveyance in consideration of future support, etc.: Construction: Personal obligation of grantee: Agreement to pay money to third persons: Condition precedent as to payment of debts of grantor: What constitutes payment: Lien on land: Nonperformance of condition.

1. The rule that a finding of fact made by a trial court will not be disturbed on appeal unless contrary to the clear preponderance of the evidence does not mean that such finding must necessarily be sustained if there is some evidence which, if not controverted, would support it.
2. The evidence in this case is *held* clearly to preponderate against a finding by the trial court that a certain farm was worth $4,000 in 1897, and to show that it was worth not more than $2,500—probably about $2,200.
3. A farm was conveyed to the grantors' son-in-law upon certain "terms and conditions" relating to the support, maintenance, and payment of indebtedness of the grantors, and providing "that in case of the payment of $1,000 indebtedness by [the grantee] at the end of ten years he shall pay to the three children of [the grantors] $300 in annual payments of $1,000 each." A few days afterwards said grantors by a lease gave to the son-in-law the use of about $1,000 worth of personal property during their lives upon condition that he remain upon the farm and in all things perform the contract contained in the deed thereof to him, and in case he so remained during their lives and fully performed said contract the title to the personalty was to vest absolutely in him. *Held,* that the obligations so assumed by

the son-in-law were personal on his part and could not be passed on to a vendee, and that any shifting of the responsibility would be a breach of the condition of the conveyance.

4. The purpose of the whole transaction was that the entire property, real and personal, should be kept intact for the protection of the grantors so long as they, or either of them, should live; otherwise that the property should revert to them.

5. The condition precedent, performance of which was essential to give vitality to the provision, in the deed of the farm, for the three children of the grantors, was the payment of $1,000 of the grantors' debts by the son-in-law personally—not by any one else or by using the property therefor.

6. The word "pay" as used in the deed was intended to have its ordinary meaning, which is to discharge an indebtedness by the use of money. It meant an actual extinguishment of indebtedness, relieving the property from the incumbrance thereof, not a mere change in form or of creditors, leaving the property burdened as before, nor a discharge of the indebtedness by using the property therefor. The condition precedent in this case was, therefore, not satisfied by the son-in-law taking up an old mortgage indebtedness and giving a new mortgage on the land, nor by his transfer of the land to his mother-in-law and her transfer to another person.

7. The conveyance of land by deed on condition that the grantee pay to a third person a specified sum of money, and acceptance of such conveyance, create a lien upon the land in favor of such third person; but where the payment is made contingent upon a condition precedent, the lien is likewise contingent, and if the time limited for such precedent event to occur expires without its happening the possibility of the lien ripening into an absolute interest no longer exists.

8. If one person, for a consideration moving to him from another, agrees to pay a sum of money to a third person, the law creates the essential of privity between him and the third person, making a binding contract between them which cannot be impaired by any subsequent agreement between the two persons first mentioned without the third person's consent; but where the promise to pay is conditional it will wait upon the condition being satisfied, and if the time set therefor lapses without such satisfaction occurring the promise falls with it.

9. The contingent provision in the deed that the grantee should pay "to the three children of [the grantors] $300 in annual payments of $1,000 each" never having become operative, it is unnecessary to determine whether that provision is void for uncertainty, or whether the trial court correctly construed it as meaning that

$100 was to be paid to each of said children on April 19, 1907, and the same amount annually thereafter until each should receive $1,000.

10. Other questions also as to whether the rights of the three children had been extinguished by the statute of limitations, or had become unenforceable through laches, and as to whether one to whom the farm had been conveyed should have a lien thereon for the value of improvements made by him superior to any claim of the children, are not decided.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Reversed.*

Action to enforce a lien on real estate. The issues were decided as the following abridgment of the findings indicates:

(1) April 19, 1897, Gottfried Schiefelbein owned the southeast quarter of the southeast quarter of section 1, town 12, range 3 east, in Sauk county, Wisconsin. (2) July 5, 1883, defendant owned and sold on land contract to said Schiefelbein the west one-half of said southeast quarter, agreeing to deed the same to him on payment of $1,600 and interest as specified, and the vendee was thereafter in possession until said April 19th. (3) Schiefelbein died March 4, 1898, leaving a widow, Henrietta Schiefelbein. (4) April 19, 1897, Schiefelbein owed a mortgage indebtedness of $400 on the first mentioned lands and $1,600, principal and interest, on the other land. (5) On said day, he and his wife deeded said lands to their son-in-law, Frank Mittelstadt. (6) Schiefelbein left four children: Louise Mittelstadt, *William Schiefelbein,* Ida Oust, and *Amelia Krahn,* who were alive April 19, 1897. (7) The deed aforesaid contained this:

"Upon the following terms and conditions—That said 2 party is to pay to first part the sum of one hundred dollars annually in case of death of the wife of 2nd part, and 1st party shall not reside with 2 party. Otherwise the sum of $25 shall be payable annually Dec. 1st so long as 1st parties

or either of them shall live. Said 2nd party also is to pay off and discharge all indebtedness of first parties. He is also to furnish to first parties or the survivor of them with a comfortable place to live, to furnish to them with proper and sufficient provisions, with proper care and all medical treatment for them or either of them so long as they or either of them shall live and to the survivor of them and on their death to pay all necessary funeral expenses for them. That in case of the payment of $1,000 indebtedness by 2 part at the end of ten years. He shall pay to the three children of 1st party $300 in annual payments of $1,000 each."

(8) When the deed was made, Schiefelbein owed, in addition to the indebtedness aforesaid, $100 to Ferdinand Garske and $40 of small bills. Mittelstadt paid the bills, the mortgage indebtedness, and the $100, soon after he took the property. He continued in possession until September 15, 1899. (9) At the date of such deed the property was worth $4,000. (10) September 15, 1899, the grantee and his wife quitclaimed the land to Mrs. Schiefelbein. (11) September 19, 1899, she conveyed the land to defendant. (12) After the date of the deed to Mittelstadt the grantors conveyed to him unincumbered personal property, of the agreed value of $944. (13) April 19, 1897, Ida Oust was fourteen years old and *William Schiefelbein* twenty-three. (14) In 1906 Ida Oust conveyed her interest in said lands to plaintiffs. (15) The three children mentioned in the first deed were Ida and plaintiffs. (16) That was conceded in the answer where it was alleged that if Mittelstadt should pay $1,000 of his grantor's indebtedness, he should pay to Ida and plaintiffs $300 in sums of $100 annually. (17) It was intended by the deed agreement that said Frank Mittelstadt, his heirs or assigns should pay said three each $1,000, $100 to each April 19, 1907, and the same annually thereafter until each should receive $1,000. (18) The value of their lien, April 19, 1897, was $1,289.58. (19) The words "annual payments" and "$1,000 each"

make impossible a construction that only $300 was to be paid each person. (21) Over $1,000 of indebtedness was paid under the deed to Mittelstadt before the ten years. Six hundred dollars were paid within two years and the obligation to defendant on the land contract was discharged. (22) When the deed was made to Mittelstadt, Schiefelbein thought he would not live long. (23) The deed was recorded April 19, 1897. (24) Plaintiffs knew nothing of the conveyance by Mittelstadt until after the transaction. (25) Ida Oust did not know of such conveyance, or the one to defendant, until after they were made. (26) Plaintiffs are not estopped to assert their claim under the deed to Mittelstadt. They have continuously asserted it. No money became due them until April 19, 1907. After learning of the deed mentioned in (25), they asserted their rights and have never ceased doing so. (27) Ida Oust never waived or became estopped from asserting her rights. (28) Defendant did not at any time dispute the claims aforesaid; but sought to buy them up. (29) His possession has always been subject thereto. (30) He had notice of the claim of Ida Oust by the record of her deed to plaintiffs April 19, 1897. (31) He has had the use of the land from the date of his deed at which time seventy acres were under cultivation. (32) The rental value to September 19, 1904, was $100 per year and thereafter has been $200 per year. (33) Since he took possession, he has made permanent improvements of the value of $1,100.90. (34) He has paid $825.58 for taxes and insurance. (35) The amount due defendant on the land contract when he obtained his deed was less than on April 1, 1897. (36) He did not assume or agree to pay plaintiffs' claims. (37) They are entitled to interest at six per cent. on $300 from April 19, 1907, and the same on subsequent payments from their due date. (38) Defendant took possession of the property with notice of the claims aforesaid, and has never evinced to plaintiffs that his pos-

session was hostile thereto. (39) The amount Mittelstadt agreed to pay for the land is not more than $2,473.

From such findings these conclusions were reached: (1) Plaintiffs have a lien on the lands for $3,000 and interest, subject to a prior lien in favor of defendant for $2,473. (2) Nine annual payments of $300 each have become due, commencing with April 19, 1907, and each draws interest as indicated in the findings. (3) They are entitled to enforce such lien by foreclosure and sale of the property. There were other conclusions as to details of the judgment and its execution and that plaintiffs were entitled to costs.

Several requests to find were made on behalf of defendant which were not embodied in the foregoing and due exceptions were taken to the refusal in respect thereto, and to many of the findings which were made.

The evidence was to the effect that the so-called conveyance of personal property was made nine days after the date of the deed and in the form of a lease to Frank Mittelstadt to have the use and benefit of the property during the life of the lessor, conditioned upon the lessee remaining upon the premises conveyed by deed and in all things fulfilling his contract therein contained and in case of his removing from such premises or failing to perform such contract that he should deliver to the lessor and his wife, or the survivor of them, all said property or account for and pay over that part not so delivered at the specified value, and that in case of full performance of said contract by said lessee and his remaining on the premises so long as the lessor and his wife, or either of them should live, the title to said property should vest absolutely in him, his heirs and assigns, he to have permission in the meantime to sell any of such property upon condition of replacing the same or paying the proceeds to the lessor and his wife, or the survivor of them.

Judgment was rendered according to the conclusions above indicated.

For the appellant there was a brief by *James A. Stone, Henry M. Winchester,* and *Olin, Butler, Stebbins & Stroud,* and oral argument by *Mr. Byron H. Stebbins* and *Mr. Stone.*

For the respondents there was a brief by *Chas. H. Stone* and *Grotophorst & Thomas,* and oral argument by *H. H. Thomas.*

MARSHALL, J. Many interesting questions are presented for consideration here, but, as what follows will show, we have not been able to proceed far before reaching an insuperable infirmity in the judgment.

Serious objection is made to the findings as a whole; but it does not seem necessary to deal therewith. We will consider only such features as seem to shed some light on the vital point to which we have referred and the features directly involved therein, some of which are not really findings of fact, though harmlessly classed as such.

The finding that the farm was worth $4,000 on the 19th of April, 1897, when it was conveyed to Frank Mittelstadt, doubtless, had a very important bearing on several other important points in the case. It is insisted that such finding is manifestly contrary to the clear preponderance of the evidence and, though contentions of that nature seldom require reference to the evidence in detail, the one here seems to be a rather striking exception, indicating that the conclusion was reached without appreciating the weakness of the basis for it.

The rule that findings of fact made by a trial court will not be disturbed unless contrary to the clear preponderance of the evidence, giving due weight to the superior advantages below for discovering therefrom, in the light of appearance on the trial, the real truth of the matter, as has often been said, is a very important one in the administration of justice; but care must be constantly exercised not to treat such

findings so lightly as to really classify them with jury findings. It must be appreciated that there is some difference as to the former, requiring the evidence on each side to be weighed and probabilities to be put against probabilities, sufficiently to determine whether those on one side so manifestly outweigh those on the other as to clearly answer to the call for that clear preponderance essential to disapproval of the result complained of. The logic of the rule contemplates that a finding is not, necessarily, to be sustained merely because there is some evidence which, if not controverted, would support it.

The finding in question rests on the evidence of two witnesses; one being a plaintiff and the other a person who, evidently, was personally friendly to plaintiffs and unfriendly to defendant, which circumstances have a material bearing on their credibility. Furthermore, neither of the witnesses qualified to testify by showing, affirmatively, that he knew the fair market value of the property in 1897, either by reference to actual sales of similar property, or otherwise, and the evidence as a whole, is quite barren of circumstances of a corroborating nature. Opposed thereto there is evidence of four witnesses who were, apparently, unprejudiced in the matter and so circumstanced as to be specially credible. One had known the place for forty-five years and lived close by it for some twenty years; one had lived near the place for some thirty-five years; another owned adjoining land and had known the particular land from before 1897 and the other examined the place in 1899 with a view of buying a farm, and was acquainted with the value of such land. Each qualified, very satisfactorily, to testify to the value. The land was described as light and rough, without any valuable timber, as badly cut up by ravines and impaired by washing, and the buildings were said to be poor,—all of log construction except the house and part of that was of such construc-

tion. They placed the value at from $1,700 to $2,500. There were some quite persuasive corroborating circumstances.

In view of the record as indicated, we cannot escape the conclusion that the evidence very significantly preponderates against the finding that the farm was worth $4,000 in 1897. The character of the four witnesses, and their probable appearance on the stand, rather corroborates their testimony than furnishes any warrant for holding that it does not manifestly outweigh the weak opposing evidence. It seems clear that the proper conclusion is that the farm was worth not more than $2,500 and probably less,—somewhere close around $2,200, in 1897, or but a very small amount more than the incumbrance upon it and the other indebtedness of Gottfried Schiefelbein when he made the deed.

The error as to the value of the farm, doubtless, led to the conclusion that, by the agreement Mittelstadt made with his grantor, it was intended that he, his heirs or assigns, should pay the three children the amounts contingently provided for them and that such amounts aggregated $1,000 each. There is nothing in the deed indicating that the grantee was to be permitted to pass his obligations on to his vendee. They were expressly made personal on his part. The very nature of the instrument and the whole transaction, including the lease of the personal property, rebut the idea that anything else was contemplated. Any shifting of the responsibility was a breach of the condition of the conveyance. Had there been no express condition, one, if necessary, would have been read out of the instrument by the rule of construction peculiarly applicable to such situations and enforced by forfeiture or otherwise, as needed for the protection of the grantors as to the dominant purpose of the grant and all which were inseparably connected therewith. *Gudden v. Estate of Gudden,* 113 Wis. 297, 89 N. W. 111; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Burgson v. Jacobson,*

124 Wis. 295, 102 N. W. 563; *Gall v. Gall,* 126 Wis. 390, 105 N. W. 953; *Lowrey v. Finkleston,* 149 Wis. 222, 229, 134 N. W. 344. The last case cited, as suggested by counsel for appellant, is directly in point. There the court held that the agreement was purely a personal one for reasons appearing upon the face of the deed, all of which, and others, characterize this case.

The two errors indicated led to the finding of fact, so called, that the $1,000 of Mr. Schiefelbein's indebtedness was paid in ten years, which was essential to give vitality to the provision for the three children. The condition precedent was payment of the $1,000 by Mittelstadt,—not by any one else or by using the property therefor. Doubtless, considering that the equity in the real estate and the value of the personal property was not large, in view of the burden imposed on Mittelstadt, independently of the provision for the three children, it might be more than he could bear, he was given the long term of ten years, which might probably span the remainder of the lives of the grantors, to pay the $1,000, and was not compelled to make payment in such time. The entire situation created by the deed and the lease points to a purpose that the entirety should be kept intact for protection of Schiefelbein and wife so long as they, or either of them, should live, otherwise that the property should revert and that such an event was thought to be probable, which was confirmed by Mittelstadt tiring of his bargain in about two years and conveying back to his mother without having paid off any of the incumbrances. The manner in which the personal property was turned over to Mittelstadt significantly shows that the intention was that all the property was to be devoted by him, as indicated, not sold or used to pay the indebtedness. His use of the personalty was limited to such time as he should stay on the farm and perform all the conditions of the deed. He was not permitted to dispose of any of it without replacing the same or paying the proceeds over

to the lessor. His interest was not to ripen into an absolute title except upon condition of his remaining on the farm so long as the lessor and his wife, or either of them, should live.

While the court found that during the two years Mittelstadt possessed the farm, he paid $600 of the indebtedness and that, later, the balance was, in effect, paid by him through the transfer to his mother and her transfer to appellant, the evidence shows that the payment of $600, so called, consisted of his taking up the old mortgage indebtedness of $400 and a note of $100, by giving a new mortgage, and paying a small amount of other indebtedness by use of money. The indebtedness against the property, which it was intended should be discharged, was not lessened at all. It was, in the end, satisfied by using the property therefor which was foreign to the purpose of the conveyance to Mittelstadt.

So, not only is the conclusion, that the condition in the deed did not contemplate personal payment by Mittelstadt, not warranted by the facts, but it contradicts the plain letter of the deed, as does also the conclusion that payment of $1,000 of indebtedness was made in two years, as contemplated by Mr. Schiefelbein. "Pay" is a word of quite comprehensive meaning; but we agree with counsel for appellant that, as used in the deed, it was evidently intended to have its ordinary meaning which is to discharge an indebtedness by the use of money. The thought was payment which would relieve the property from incumbrance, not a mere change in form, or of creditors, leaving the property burdened as before, or a discharge of indebtedness by using the property therefor. That the ordinary meaning of the word "pay" is as indicated, is supported by *Becker v. Chester,* 115 Wis. 90, 122, 91 N. W. 87, 650, and cases cited to our attention. *Marinette v. Oconto Co.* 47 Wis. 216, 2 N. W. 314; *Oneida Co. v. Tibbits,* 125 Wis. 9, 15, 102 N. W. 897. That, as used in this case, it contemplated the movement of

money to the creditors and actual extinguishment of indebtedness, seems very plain. Therefore it is considered that the conclusion that the circumstance occurred, specified in the deed as essential to vitalize the provision for the three children, cannot be approved. The conclusion should, it seems, have been to the contrary.

The decision below that the conveyance of land by one person to another by deed, on condition of such other paying to a third person a specified sum of money, and acceptance of such conveyance, creates a lien upon the land in favor of such third person, is correct,—*Wier v. Simmons,* 55 Wis. 637, 13 N. W. 873; *Williams v. Williams,* 82 Wis. 393, 52 N. W. 429; *Merton v. O'Brien,* 117 Wis. 437, 94 N. W. 340; *Powers v. Powers,* 28 Wis. 659; *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659; but where the payment is made contingent upon a condition precedent, the lien is likewise contingent and, if the time limited for such precedent event to occur expires without its happening, the possibility of the lien ripening into an absolute interest no longer exists. That was what happened in this case.

By the same logic the doctrine of *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440, and similar cases, has no application here. If one, for a consideration moving to him from another, agrees to pay a third person a sum of money, the law creates the essential of privity between him and such third person, making a binding contract between them which cannot be impaired by any subsequent agreement between such other and the first person without such third person's consent; but where the promise to pay is conditional, it will wait upon the condition being satisfied, and if the time set therefor lapses without such satisfaction occurring, the promise falls with it. So the contingent lien and obligation to pay in this case never ripened into absolute rights and, in the nature of things, never can.

Thus the end of this case has been reached without any

necessity for considering whether the language of the contingent provision for the three children is void for uncertainty, or, if not, whether the trial court correctly construed such language, or whether the interest of the three children was extinguished by the statute of limitations, or became unenforceable, by laches, or whether, equitably, appellant should have been adjudged to have a lien upon the property for the value of his improvements superior to any interest of respondents, some of which, particularly the first two, are involved in much difficulty.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the same with costs.

MADSON, Respondent, vs. JOHNSON, Appellant.

December 5, 1916—January 16, 1917.

Contracts: Validity: Restraining practice of profession in certain territory.

1. Contracts imposing reasonable restraint upon the right to exercise one's calling, trade, or profession are valid.
2. A contract by which defendant, upon selling to plaintiff his real estate, office fixtures, and good will as a veterinarian, agreed that he would not practice that profession "in Appleton or vicinity" unless he purchased plaintiff's veterinary practice or entered into a partnership with him, imposed only a reasonable restraint and was valid.

APPEAL from an order of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

This action is brought by the plaintiff to enjoin the defendant from continuing his practice of veterinary medicine and surgery in the city of Appleton and vicinity and for the recovery of $1,000 as damages.

Both plaintiff and defendant are licensed practitioners of

veterinary medicine and surgery. The defendant was a successful practitioner at Appleton, Wisconsin, and on March 31, 1914, he sold his real estate, office fixtures, and good will as such veterinarian to the plaintiff. The plaintiff paid the defendant $4,500 therefor and received from defendant a bill of sale conveying the property as agreed. The bill of sale contains the following provision:

"Further it includes my good will, and further that I will not practice veterinary medicine or surgery in Appleton, or vicinity, unless it would be to be in partnership with said *Dr. William Madson,* or to buy out the said above mentioned *Dr. William Madson.*"

On or about March 10, 1915, the defendant again opened an office in the city of Appleton, Wisconsin, and began the practice of veterinary medicine and surgery. The plaintiff brings this action, alleging a violation of the agreement, and asked that defendant be restrained from practicing his profession in Appleton or vicinity.

The defendant demurred to the complaint and the circuit court overruled the demurrer. From the order overruling the demurrer this appeal is taken.

For the appellant there was a brief by *Ryan, Cary & Frank,* and oral argument by *T. H. Ryan.*

For the respondent there was a brief by *Morgan & Benton,* and oral argument by *John Morgan.*

SIEBECKER, J. It is well established that contracts imposing reasonable restraint upon the right to exercise one's calling, trade, or profession are valid. This doctrine has been applied and upheld in this state under the varying facts and circumstances disclosed by the following cases: *Fairbank v. Leary,* 40 Wis. 637; *Washburn v. Dosch,* 68 Wis. 436, 32 N. W. 551; *Richards v. American D. & S. Co.* 87 Wis. 503, 58 N. W. 787; *Palmer v. Toms,* 96 Wis. 367, 71 N. W. 654; *Tecktonius v. Scott,* 110 Wis. 441, 86 N. W. 672; *Cottington*

v. Swan, 128 Wis. 321, 107 N. W. 336; *My Laundry Co. v. Schmeling,* 129 Wis. 597, 109 N. W. 540.

The terms of the agreement of these parties restrain defendant from practicing his profession in "Appleton or vicinity" unless he enters into partnership with the plaintiff for that purpose or purchases plaintiff's professional business. The significance of the word "vicinity" in such contract is to be ascertained from the intent of the parties to the contract in the light of the facts and circumstances of the transaction. *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631. It appears that the defendant reopened the practice of his profession in the city of Appleton, which is specifically forbidden by the contract. Courts have sustained as valid agreements of this kind without limitation as to time in specified localities. See agreements in restraint of trade, 9 Cyc. 527, paragraph (4) and note, Restraint Limited as to Space but Unlimited as to Time; also 6 Ruling Case Law, sec. 205. The restraint in this agreement to the effect that defendant was not to practice his profession or calling in "Appleton or vicinity" is reasonable and valid within the doctrine adhered to in the adjudications of this and other states.

By the Court.—The order appealed from is affirmed.

STOCKER and others, Respondents, vs. DUBUQUE FIRE & MARINE INSURANCE COMPANY, Appellant.

December 5, 1916—January 16, 1917.

Fire insurance: Standard policy: Personal property: Incumbrance by "chattel mortgage:" Trust deed construed.

A so-called trust deed, given to secure a loan, which described and conveyed certain land, "together with all the privileges and appurtenances . . . , including therein any and all buildings, improvements, machinery, tools, implements, and fixtures, whether

attached or unattached to the said real estate, . . . and all machinery and fixtures hereinafter installed, and also any and all tools and implements used by [the grantor] in or about the premises," is *held* to have covered fixtures only which were a part of the realty, and not to have been an incumbrance of personal property "by a chattel mortgage" within the meaning of sec. 1941—46, Stats.

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

Action to recover on two fire insurance policies. The defendant denied liability.

After the evidence was all in the defendant moved for a directed verdict. The following verdict was returned:

"(1) Were the policies in suit issued to the plaintiff by the defendant company and the premiums paid thereon? *A.* (by the court). Yes.

"(2) Was the plaintiff *Jacob J. Stocker* the owner of the property described in the policies of insurance at the time of the fire? *A.* (by the court). Yes.

"(3) Did the fire originate from causes other than those excepted in the policies?

"(b) Did the plaintiff notify the fire marshal of said fire pursuant to section 1496*i*—section 5, on April 22, 1915?

"(c) Did the plaintiff furnish the defendant within sixty days after the fire with proofs of loss under the policies of insurance on or about June 3, 1915? *A.* (by the court). To each of the foregoing questions: Yes.

"(4) Was the real-estate mortgage of $7,500 executed by *J. J. Stocker* and wife to *Frank J. Beau* on February 3, 1915, and recorded on February 5, 1915, duly canceled and satisfied by satisfaction executed February 20, 1915, and recorded March 10, 1915? *A.* (by the court). Yes.

"(5) Did the plaintiff *J. J. Stocker* and wife on the 20th day of February, 1915, execute and deliver the trust deed in evidence to the plaintiff *John J. Beau,* covering all the buildings, improvements, machinery, tools, implements, and fixtures, either attached or unattached to the real estate, insured by the defendant herein? *A.* (by the court). Yes.

"(6) Was the trust deed set forth in question No. 5 in

force and effect at the time of the fire? *A.* (by the court). Yes.

"(7) Did the defendant give the mortgagees, *John L. Beau* and *Frank J. Beau,* or either of them, notice of the cancellation of the policies? *A.* (by the court by consent of parties). No.

"(8) What was the total amount of insurance, valid or invalid? *A.* (by the court by consent of parties):

"(a) On main building	$7,800
"(b) On contents of main building	5,500
"(c) On stock	1,100
"(d) On barn	400
"(e) On icehouse	200

"(9) How much insurance was written by the defendant on items set forth in question No. 8? *A.* (by the court by consent of parties):

"(a) On main building	$1,800
"(b) On contents of main building	2,200
"(c) On stock	400
"(d) On barn	400
"(e) On icehouse	200

"(10) What was the cash value on April 18, 1915, of each item referred to in question No. 8 excepting main building? *A.* (by the court by consent of parties):

"(a) Contents of main building exceeded	$5,500 00
"(b) Barn	400 00
"(c) Icehouse	200 00
"(d) Stock	721 75

"(11) What was the amount of loss and damage of items set forth in question No. 8 excepting main building? *A.* (by the court by consent of parties):

"(a) Loss on contents of main building exceeded	$5,500
"(b) Loss on barn	75
"(c) Loss on icehouse	75
"(d) On stock	600

"(12) Was the plaintiff's one and one-half story concrete and frame, vulcanized roof building and additions adjoining and communicating therewith, occupied as a condensed milk, dairy, and product factory, situated in the northwest quar-

ter of the northeast quarter, section 28, township 21, range 15 east, town of Dale, Outagamie county, Wisconsin, wholly destroyed by fire on the night of the 18th or morning of the 19th of April, 1915? *A.* Yes.

"(13) What was the value of the main building at the time of the fire? *A.* $10,000.

"(14) What was the amount of loss and damage to the main building caused by the fire? *A.* $10,000.

"(15) Did the plaintiff, on the 10th day of March, 1915, notify the defendant of the execution, delivery, and recording of the trust deed? *A.* Yes.

"(15½) Did the plaintiff *Jacob J. Stocker* instruct John M. Balliet, the agent of the defendant company, on March 10, 1915, to attach to the policies in suit a loss payable clause, payable to *John L. Beau,* trustee? *A.* Yes.

"(16) Did the plaintiffs notify the defendant, on the 10th day of March, 1915, of the executing and recording of the second mortgage to *Frank J. Beau?* *A.* Yes.

"(17) Were the defendant's two policies of insurance canceled by mutual consent of *Jacob J. Stocker* and the defendant's agent, John M. Balliet, before the fire? *A.* No."

The court ordered judgment for plaintiff on the verdict. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Ryan, Cary & Frank,* attorneys, and *Gill & Barry,* of counsel, and oral argument by *A. R. Barry.*

Francis S. Bradford, for the respondents.

KERWIN, J. Counsel for appellant in their brief say that the five errors assigned involve the construction of secs. 1941—46 and 1941—62, Stats. The only material question involved upon this appeal and arising under these sections is whether the so-called trust deed placed upon the property was an incumbrance of personal property included in the policy by chattel mortgage within the meaning of sec. 1941—46.

If there was no incumbrance of personal property covered by the policy, then the question of waiver discussed under sec. 1941—62 need not be considered, because it has no bearing on the case. It appears from the record in the instant case that no personal property was included in the trust deed unless certain fixtures described in connection with the description of the land can be said to be personal property.

It seems plain that there was no intention to include anything but real estate in the trust deed, because the policy did cover certain articles of personal property which were not in the trust deed, viz. stock of milk and dairy products on hand or in process of manufacture, cans, chemicals, etc.

The trust deed was given to secure a loan of $15,000 and obviously was intended to cover, and did cover, only real estate. In addition to description of the land by metes and bounds the deed contained the following:

"Together with all the privileges and appurtenances to the same belonging or in any wise thereunto appertaining, including therein any and all buildings, improvements, machinery, tools, implements, and fixtures, whether attached or unattached to the said real estate, and to include any and all additional buildings erected or connected with the said plant or buildings, and all machinery and fixtures hereinafter installed, and also any and all tools and implements used by the said *Jacob J. Stocker* in or about the premises.

"To have and to hold the above described premises, property, and appurtenances unto the said party of the second part and his successors in trust, for the purpose and upon the conditions and subject to the provisions hereinafter set forth."

The portion of the description above quoted and following description of the lands covered, and was intended to cover, fixtures only, which were part of the real estate conveyed. We are convinced that the instrument in question was a trust deed of real estate, not a chattel mortgage. We find no error in the record.

By the Court.—The judgment is affirmed.

STOCKER and another, Respondents, vs. NETHERLANDS FIRE & LIFE INSURANCE COMPANY, Appellant.

December 5, 1916—January 16, 1917.

Stocker v. Dubuque F. & M. Ins. Co., ante, p. 614, followed.

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

For the appellant there was a brief by *Gill & Barry*, and oral argument by *A. R. Barry.*

Francis S. Bradford, for the respondents.

KERWIN, J. This case is ruled by *Stocker v. Dubuque F. & M. Ins. Co., ante*, p. 614, 160 N. W. 1035.

By the Court.—Judgment is affirmed.

SEYMOUR STATE BANK, Appellant, vs. RETTLER, Respondent.

December 5, 1916—January 16, 1917.

Actions: Stipulation to dismiss no bar to subsequent action: Agreement to dismiss on merits: Authority of attorney: Parol evidence.

1. A stipulation to dismiss an action without costs is not a bar to a subsequent action for the same cause.
2. An agreement by an attorney to dismiss an action upon its merits is invalid in the absence of evidence that he had special authority so to do.

[3. Whether, where a former action for the same cause was dismissed by stipulation, parol testimony is admissible to show an agreement between the attorneys for the respective parties—pursuant to which the stipulation was filed—that plaintiff would waive his cause of action, is not decided.]

APPEAL from a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

Action upon a joint and several promissory note executed by the defendant and one J. J. Rettler. The defense

pleaded was a dismissal as to defendant of an action upon the same note previously brought in the municipal court. Upon the trial evidence was received that the attorney for the plaintiff in the first action agreed that if the present defendant would consent to a withdrawal of his answer, to a dismissal as to him without costs, and permit judgment to be taken at once against J. J. Rettler, who was in default, plaintiff would waive his cause of action against him; that such agreement was carried out and the action in the municipal court was dismissed as to defendant. The court held such agreement binding upon plaintiff and entered a judgment dismissing the action. Plaintiff appealed.

For the appellant there was a brief by *Lehner & Lehner,* and oral argument by *Philip Lehner.*

Francis S. Bradford, for the respondent.

VINJE, J. In support of the judgment it is urged that the stipulation of record in the municipal court pleaded in the answer constitutes a bar to the action. The stipulation was:

"It is hereby stipulated and agreed that the above entitled action is hereby discontinued without costs as to defendant *Matt Rettler,* and the answer of *Matt Rettler* heretofore served and filed herein be and the same is hereby withdrawn from this action; and the plaintiff bank may take judgment in this action against the remaining defendant, John J. Rettler, if it so desires, such defendant John J. Rettler being in default and making no appearance or defense in this action."

The words "without costs" were interlined in pen by plaintiff's attorney. That a stipulation to dismiss does not constitute a bar to the action was held in *Bishop v. McGillis,* 82 Wis. 120, 51 N. W. 1075. It was there also intimated that a stipulation for a dismissal without costs would have no broader or different construction than a mere stipulation to dismiss, since in both cases the only thing agreed upon was a dismissal; and that the terms of dismissal could not be held

to enlarge the effect thereof. We are satisfied that such construction is correct, and so far as the question of dismissal is concerned the case is ruled by *Bishop v. McGillis, supra.*

Assuming, but not deciding, that parol testimony was admissible to show the agreement entered into between the attorneys for the respective parties in the municipal court, we reach the question whether an agreement by an attorney to dismiss an action upon the merits is valid without evidence of special authority so to do. In *Kelly v. Wright,* 65 Wis. 236, 26 N. W. 610, this court said:

"It requires no citation of authorities to show that an attorney, by virtue of his retainer alone, has no authority to compromise a valid claim for $300 against a person presumably solvent and responsible by accepting in full satisfaction thereof the note of an irresponsible person for $80. Because there is no proof of authority to make the settlement the plaintiff is not bound by it, unless he afterwards ratified it." Page 239.

In the present case there is no proof of authority to make the settlement and no proof of ratification. The record shows that judgment was taken in the municipal court against John J. Rettler and a transcript thereof filed in another county where he owned some incumbered real estate. The judgment against him remains wholly unsatisfied. *Kelly v. Wright* has been followed in *Fosha v. O'Donnell,* 120 Wis. 336, 97 N. W. 924, and it is the general rule in most jurisdictions that an attorney, by virtue of his retainer alone, does not have the implied authority to enter a retraxit. See 2 Ruling Case Law, 992 and cases cited, and note to *Sheffer v. B. B. Perkins & Co.* (83 Vt. 185, 75 Atl. 6) in 25 L. R. A. N. S. 1313. The trial court therefore erred in holding the agreement to dismiss upon the merits made by plaintiff's attorney binding upon it.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

BALDWIN and others, Trustees, Appellants, vs. BARBER and others, Respondents.

December 6, 1916—January 16, 1917.

Tax titles: Validity: When grantor of land bound to pay taxes.

1. **One cannot acquire a valid tax title founded upon a sale for taxes which it was his duty, either legally or equitably, to pay, and enforce it as against any person who would be prejudiced by his neglect.**
2. **Under sec. 1153, Stats. 1898, where land was conveyed (in this case by quitclaim deed) after the date of the tax warrant, it was the duty of the grantor to pay the taxes assessed before the conveyance, if there was no express agreement to the contrary.**

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Affirmed.*

Action to quiet title. Validity of tax deed. The material facts are as follows: On January 3, 1900, *George Baldwin,* being the owner of certain lands, conveyed the same to the predecessors in title of the defendants by long-form quitclaim deed, which recited that in consideration of $25 "the parties of the first part have given, granted, bargained, sold, remised, released and quitclaimed, and by these presents do grant, bargain, sell, remise, release and quitclaim unto the party of the second part, his heirs and assigns forever, the following described real estate in the county of Langlade, state of Wisconsin, to wit," with the usual "to have and to hold" clause. The deed contained no covenant or agreement as to who should pay the taxes assessed against the property for the year 1899. The taxes were returned unpaid, and at the tax sale held on the 15th day of May succeeding, *Baldwin* purchased the premises at the tax sale. A tax certificate was issued to him for this land and other lands, and in due time a tax deed was issued to *Baldwin* dated May 21, 1903. Plaintiffs in this action claim under the tax deed. Defendants claim under the quitclaim deed given January 3, 1900.

For the appellants there was a brief by *Ryan, Cary & Frank,* and oral argument by *Paul V. Cary.*

Wilbur E. Hurlbut, for the respondents.

ROSENBERRY, J. The sole question is, Could *Baldwin* take a valid tax deed based upon the taxes assessed in 1899 upon the premises in question? The taxes for the year 1899 were assessed against *Baldwin,* and in addition to that fact sec. 1153, Stats. 1898, then provided:

"As between the grantor and grantee of any land, when there is no express agreement as to which shall pay the taxes that may be assessed thereon before the conveyance, if such land is conveyed even with or prior to the date of the warrant authorizing the collection of such taxes then the grantee shall pay the same; but if conveyed after that date then the grantor shall pay them."

It appeared without dispute that the tax warrant was placed in the hands of the treasurer for collection on December 30, 1899. It is the established law of this state that no one can acquire a valid tax title founded upon a sale for taxes which it was his duty, either legally or equitably, to pay, and enforce it as against any person who would be prejudiced by his neglect. *Olson v. McDonald,* 156 Wis. 438, 145 N. W. 1078; *Mariner v. Milwaukee,* 146 Wis. 605, 131 N. W. 442; *Perkins v. Wilkinson,* 86 Wis. 538, 57 N. W. 371; *Bassett v. Welch,* 22 Wis. 175.

We think the duty of paying this tax was legally imposed upon *Baldwin* (1) by the assessment against him of the amount of the tax, and (2) by the terms of sec. 1153, Stats. 1898, which became part of the contract or deed between the parties, dated January 3, 1900. The very purpose and object of assessing and levying taxes is to impose a legal duty upon the person against whom they are assessed and levied to pay them. The law of the land is a part of every contract. Sec. 1153, Stats. 1898, became a part of the contract between

the parties, and by its terms it imposed upon *Baldwin* the legal duty, as between the grantor and the grantee, of paying these taxes. The statute says, "as between the grantor and grantee of any land" the grantor shall pay the tax when the conveyance is made after the date of the tax warrant. Certainly there can be no claim in this case that *Baldwin* was not the grantor and that the predecessors in title of the defendants were not the grantees, and by the terms of the statute it was the duty of the grantor to pay the taxes in question. The purchase of the tax certificate therefore amounted to nothing more than a payment of the tax, and the deed issued upon it was void.

By the Court.—Judgment affirmed.

CHRISTL, Appellant, vs. HAUERT, Respondent.

December 6, 1916—January 16, 1917.

Automobiles: Collision on highway: Negligence: Statutory speed limit: Questions for jury: Instructions to jury.

1. **The speed at which an automobile might lawfully be driven when meeting another vehicle on a public highway where the traveled track was less than twenty feet wide, was governed by ch. 170, Laws 1915, from the time that act took effect (May 31, 1915) until its repeal on August 20, 1915, by ch. 557, Laws 1915, although a different provision is found in sec. 1636—49*a*, Stats. (Laws 1913, ch. 138).**
2. **Upon the evidence in this case the question whether defendant was exceeding the statutory speed limit when his automobile collided with plaintiff's car, is *held* to have been one for the jury.**
3. **A requested instruction upon the ultimate question of liability, which informs the jury as to the effect their answer to a question in the special verdict will have upon the final result, should not be given.**
4. **Where, in charging the jury as to the burden of proof upon the question whether defendant was guilty of negligence, the trial court misquoted the question by inserting the word "contributory" before the word "negligence," the error is *held* harmless.**

APPEAL from a judgment of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

Action to recover damages for personal injuries resulting from the collision of two automobiles on the highway June 11, 1915. The facts were that at about 10:30 o'clock p. m. of that day the plaintiff at Appleton, with two male companions, hired from one Steidel a taxicab and driver to take them to Menasha, a few miles away, where a street carnival was then in progress. The highway between the two cities is much used. It runs west for a mile from Appleton to Gmeiner's Corners, where it turns and runs south. The traveled track is fourteen feet in width and is constructed of concrete from Appleton to a point about 500 feet from said corners, where it changes to macadam of the same width, and on each side of this roadway is a shoulder of dirt or clay sloping into the gutter. Just as the plaintiff's car going west left the concrete portion of the road it passed the automobile of one Nye, which was standing on the south side of the road headed toward Appleton. At that time the defendant's automobile, driven by himself, was approaching from the west and headed toward Appleton. About sixty feet west of the Nye car the collision occurred between the two cars. Plaintiff claims that the defendant was on the north or wrong side of the highway at the time, but defendant claims that he was on the south side of the highway and that plaintiff's car, after passing the Nye car, turned to the south side of the highway and struck defendant's car on the left side. There was conflicting testimony as to the speed of the two cars at the time of the collision. The plaintiff's car was turned over and plaintiff was thrown under it, suffering some injuries. A special verdict consisting of five questions was submitted to the jury, the inquiries being (1) whether the defendant was negligent at the time, (2) if so whether such negligence was the proximate cause of plaintiff's injury, (3) whether the plaintiff was guilty of contributory

negligence, (4) if so whether such negligence was a proximate cause of plaintiff's injuries, and (5) what damages were suffered by the plaintiff. The jury answered the first question in the negative, and did not answer the second, third, or fourth questions, but assessed the damages at $500.

A motion for judgment in favor of the plaintiff notwithstanding the verdict was overruled and the court entered judgment for the defendant upon the verdict, and the plaintiff appeals.

For the appellant there was a brief by *Ryan, Cary & Frank,* and oral argument by *T. H. Ryan.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

WINSLOW, C. J. The appellant's principal contention is that a verdict in his favor should have been directed because it is undisputed that the defendant was exceeding the statutory speed limit at the time of the accident.

Ch. 170 of the Laws of 1915 was in force at the time of the accident (though repealed August 20th following by ch. 557 of the laws of the same year), and this law provided that upon meeting any other automobile on a public highway where the traveled track is less than twenty feet in width, the driver of an automobile should reduce his speed to a rate not exceeding fifteen miles an hour. This doubtless governed the situation here, although a different provision is found in sec. 1636—49*a*, Stats. (Laws 1913, ch. 138). The claim is that the defendant himself testified that he was proceeding at a speed exceeding fifteen miles an hour, and is bound by the admission. We do not think the court would have been justified in so holding. It is true that the defendant testified that he was going eighteen to twenty miles an hour when he rounded the Gmeiner curve, but he also testified that after rounding the curve he went east about fifteen or eighteen miles an hour all the way down; that he passed

some boys about 100 feet from the place of collision and then saw that the Steidel car was coming fast and slacked up; that he was going between fifteen and sixteen miles an hour when he first observed the speed of the Steidel car. He also testified that he did not look at his speedometer. It must be remembered that the question of the speed was entirely a question of judgment, and we do not think it can be said that the defendant's testimony is so clear upon the question as to justify the court in taking the question from the jury. Furthermore, a disinterested witness, one Bauerfein, who was walking on the highway between Gmeiner's curve and the scene of the accident and was passed by the defendant's car, testified that in his judgment it was going between twelve and fifteen miles an hour.

The plaintiff requested an instruction to the effect that where two persons are guilty of negligence resulting in injury to a third, the fact that one is negligent does not relieve the other from liability, for the law is that recovery may be had from either; therefore, if the injury was caused by the independent and concurring negligence of Hauert and Steidel, the first question must be answered "Yes." It is sufficient to say that this is an instruction upon the ultimate question of liability and informs the jury of the effect of their answer upon the final result, and hence was properly refused in a case of special verdict like the present. *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 113 N. W. 738. The court in charging the jury upon the first question as to the burden of proof quoted the question and in so doing inserted the word "contributory" before the word "negligence," so that it read, "Was the defendant guilty of *contributory* negligence at the time of the collision in question?" We cannot imagine that this slight error in verbiage was harmful. The jury had the correct written verdict with them in the consultation room and it is almost fanciful to suppose that the insertion of the word by the judge in reading his instruction would be remem-

bered by the jury or that any significance would be given to it by the jury even if it were remembered.

A criticism of the charge as to the elements of damage in considering the fifth question becomes immaterial in view of the conclusions reached upon the other questions.

By the Court.—Judgment affirmed.

STATE EX REL. SCHOMMER, Respondent, vs. VANDENBERG, Appellant.

December 6, 1916—January 16, 1917.

Elections: Validity: Ineligibility of person chosen: Town treasurer: Inability to qualify: Vacancy: Filling by appointment: Statute construed: "Elected."

1. It is not necessary to the validity of an election that the person voted for should be then eligible to hold the office, if the electors in good faith believed he was and voted for him with that understanding. That he could not qualify would not affect the validity of his election, but merely his right to hold the office.
2. Where an ineligible person was legally elected town treasurer his refusal, due either to inability or disinclination, to qualify for the office created a vacancy and, under sec. 818, Stats., the town board properly appointed another treasurer in his place.
3. A town treasurer appointed pursuant to sec. 818, Stats., is "elected" within the meaning of that word in sec. 811, which provides that every town officer shall hold his office "until his successor is *elected* and qualified."

APPEAL from an order and a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

Action to test defendant's title to the office of town treasurer of the town of Freedom in Outagamie county. The complaint shows that at the annual town meeting in 1915 the defendant was duly elected town treasurer for one year and that he qualified and served as such during the year; that at the an-

nual town meeting for 1916 he received 152 votes for such office, while one Leisch received 163 votes for such office, and that the board of inspectors of the election certified that Leisch was duly elected town treasurer for the ensuing year. Leisch refused to qualify on the ground that he was not at the time of the election and has not since been qualified to hold the office, though he and the electors believed he was qualified at the time of the election. It further shows that on April 19, 1916, and more than ten days after the election, the town board duly appointed the complainant, *Schommer,* town treasurer; that he has duly qualified and demanded the possession of the office from the defendant and has by him been refused possession. The defendant demurred to the complaint. The court overruled the demurrer with leave to answer within twenty-four hours. Defendant failed to answer within the prescribed time and judgment was entered against him. From the order overruling the demurrer and the judgment of ouster the defendant appealed.

For the appellant there was a brief by *Rooney & Grogan,* attorneys, and *George N. Danielson,* of counsel, and oral argument by *Francis J. Rooney.*

For the respondent there was a brief by *Morgan & Benton,* and oral argument by *John Morgan.*

VINJE, J. It was held in *State ex rel. Schuet v. Murray,* 28 Wis. 96, that it was not necessary to the validity of an election that the person voted for should be then eligible to hold the office if the electors in good faith believed he was and voted for him with that understanding. This rule was reaffirmed in *State v. Trumpf,* 50 Wis. 103, 5 N. W. 876, 6 N. W. 512. The case of *State ex rel. Bancroft v. Frear,* 144 Wis. 79, 128 N. W. 1068, does not hold the contrary. In that case the person voted for was, to the knowledge of the voters, dead, hence no valid vote could be cast for him. In the present case it is admitted that Leisch was believed by the

electors to be eligible at the time the votes were cast. It follows from this that he was legally elected. That he could not qualify did not affect the validity of his election but merely his right to hold the office. Having been legally elected and having refused to qualify, a vacancy was created in the office of town treasurer. Sec. 818, Stats. 1915. The reason for a refusal to qualify is immaterial. It may be due to inability or to disinclination. Whatever the cause, a vacancy is created by the refusal. In this case a vacancy was also created by another clause of said section providing that a vacancy shall be created "if he shall be unable for any cause to perform his official duties." Here ineligibility to hold office rendered him unable to perform his official duties.

The contention that the provision in sec. 811, Stats. 1915, that the treasurer "shall hold until his successor is *elected* and qualified," excludes one who has been appointed and has qualified from lawfully holding the office must be held to be without force, because if sound it would render those provisions of the statute providing for an appointment meaningless. The words quoted must be held to include an appointee as well as one elected in order to give full force and effect to all the statutory provisions relating to the incumbency of the office.

Some argument is made that the defendant should now be allowed to answer if the order is affirmed, so that he may plead such defenses to the merits as he may have. No application to that effect was made to the trial court and we deem the record barren of any facts calling for further litigation of the matter.

By the Court.—Order and judgment affirmed.

CITY OF SUPERIOR, imp., Respondent, vs. NORTHWESTERN FUEL COMPANY, Appellant.

December 7, 1916—January 16, 1917.

Plats of land: Record: Statutory requirements: Substantial compliance: Map, legend, and certificate taken together: Streets: Dedication: Riparian rights: Municipal corporations: Estoppel as to rights of public in streets, etc.: Stipulation as to remedy: Effect on determination of issues.

1. Where the original of a plat is not produced, it must be assumed that it was in accordance with the record thereof.
2. Even though the makers of a plat, which was certified and acknowledged by the owners and duly filed for record, did not comply with secs. 2260–2264, R. S. 1878, in that the map does not show on its face the center lines of the streets, or that monuments were placed at the beginning and terminus of each street, or the material of which such monuments were constructed, and the respective ownerships are not properly indicated thereon, yet, there being a legend upon the map which describes in detail the lands platted, the courses and distances of the boundaries, the size and location of the lots, the manner in which the beginnings and termini of the streets were indicated, the location of monuments, the dimensions and locations of alleys, and the material of which monuments were constructed,—so that every material fact required by statute to be exhibited upon the map can be definitely ascertained and located; and the certificate of the surveyor being full and complete and stating that he had fully complied with the law in surveying, subdividing, and mapping the premises, it is *held* that the map, the legend, and the certificate of the surveyor taken together constitute a substantial compliance with the statutory requirements and show a statutory dedication of the streets.
3. It appearing from such map and legend that the plattors intended to extend Superior street (afterwards called Hill avenue) in the city of Superior northerly to the shore of the St. Louis river (Bay of Superior), such street was thereby dedicated to the public use accordingly and the public became vested with the right to pass over a strip of the submerged land lying between the shore line at the end of the street and the dock line established by the United States, such strip being bounded by lines drawn from the thread of the stream and at right angles therewith to the points where the boundaries of the street intersect the shore line of the river.

4. It appearing that the city of Superior never used or occupied the northerly end of said street and that the same had never been opened for public travel; that the city accepted a later plat upon which the strip above mentioned was not shown as a street but with other submerged lands lying between the shore line and the dock line was included within block lines; that the defendant purchased said strip and adjoining lands in accordance with the later plat and in reliance thereon and proceeded to make extensive and valuable improvements thereon, including a large coal dock costing several hundred thousand dollars; that the city made no objection, but on the contrary recognized defendant's ownership of the lands and taxed them accordingly; and that the opening of a public way through the property would greatly damage defendant's plant and permanently impair its usefulness,—it is *held* that the city is estopped from asserting any claim or interest in the premises owned by defendant on account of any rights which the city or the public acquired by the extension of Superior street to the shore line of the river, as shown in the first plat.
5. The fact that the parties to the action made a stipulation to the effect that if the claim of the city should be upheld it should be entitled, in lieu of its rights over the strip mentioned, to similar rights over another strip, cannot be considered in determining the issues in the case, since such determination must be based upon the facts as they existed when the action was begun.
6. The city authorities have charge of and represent the rights of the public in and to the public streets, and their acts may be such as to lay the foundation for an equitable estoppel against the assertion of such rights; but in order that such an estoppel *in pais* may arise there must be inequitable conduct on the part of the city and irreparable injury to persons honestly and in good faith relying thereon.

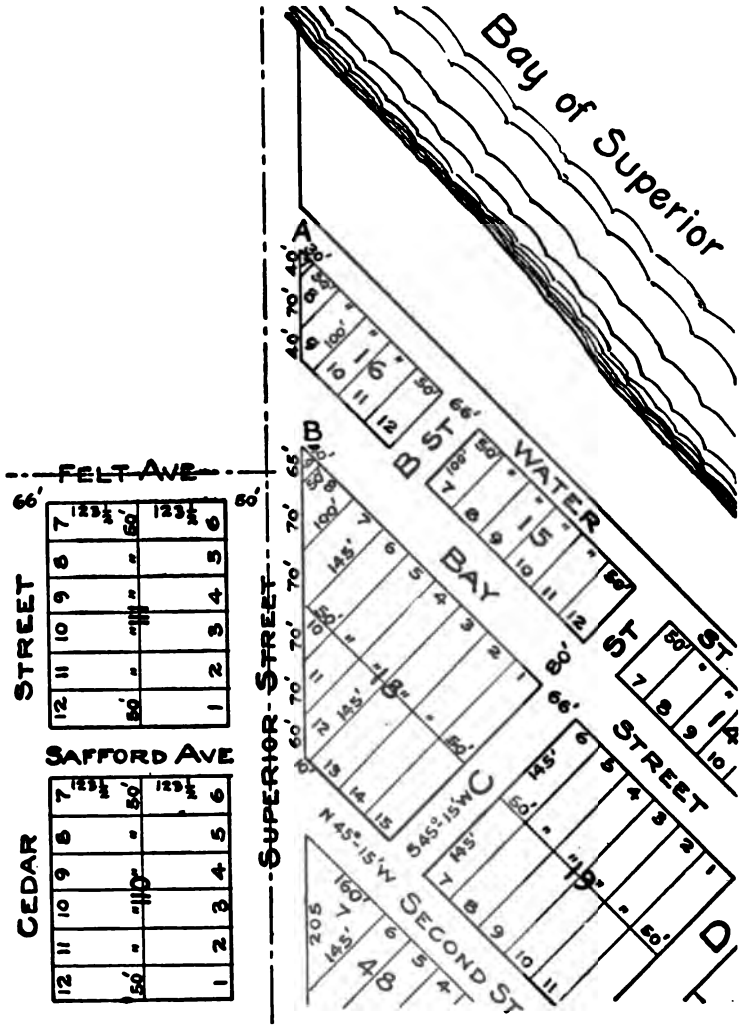
APPEAL from a judgment of the circuit court for Douglas county: G. N. RISJORD, Judge. *Reversed.*

Action to establish boundaries and to quiet title to certain lands abutting on the St. Louis river and that part thereof commonly known as the Bay of Superior. The facts material on this appeal are as follows:

On June 13, 1882, Hiram Robbins owned certain lands in the northeast quarter of the southeast quarter of section 14, and Vincent Roy and Lisette Roy owned certain lands in

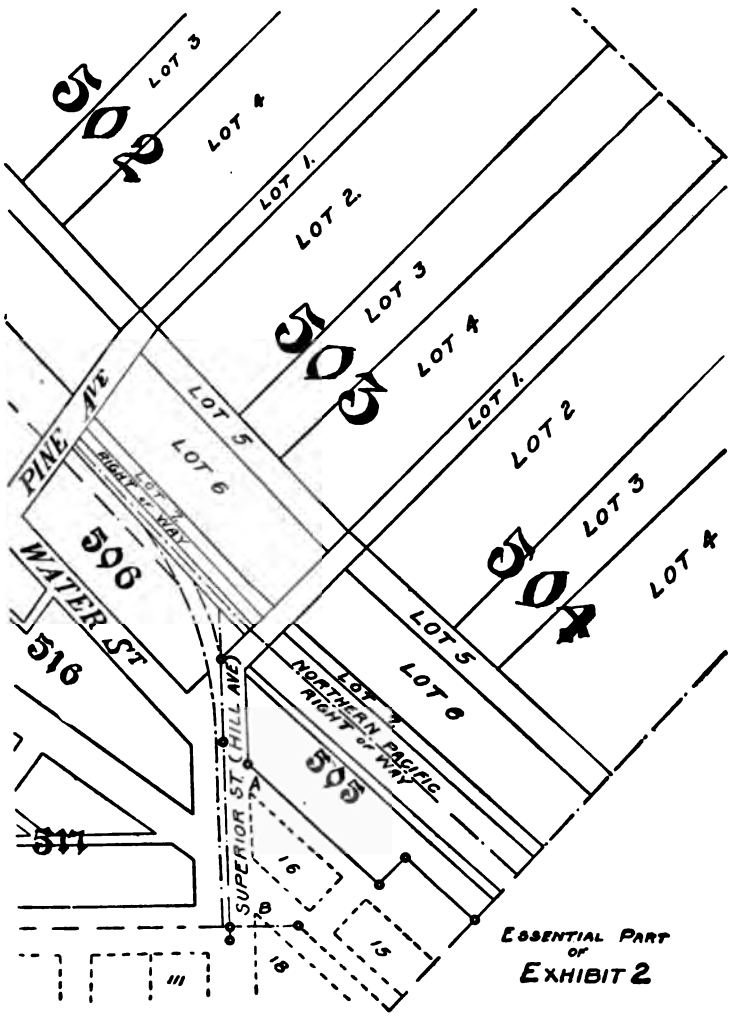
lot 2 of section 13, all in township 49 north, of range 14 west. On that day the owners of these several tracts united in the making and execution of a plat, known as Exhibit A, the essential part of which is shown in the diagram on p. 634. The center of Superior street where the same is of the width of 100 feet is on the section line between sections 13 and 14. The name of Superior street was afterwards changed to Hill avenue, by which name it will be hereinafter designated. That part of Hill avenue which is adjacent to the east side of the northeast quarter of the southeast quarter is 100 feet in width; that part thereof lying northerly is 50 feet in width, the section line forming the center of Hill avenue where it is 100 feet wide and the westerly boundary thereof where it is 50 feet wide. Attached to the map was the certificate of the surveyor substantially in the form required by the law as it then was. The plat was also certified and acknowledged by the owners of the property embraced within the plat and was on said day duly filed for record in the office of the register of deeds of Douglas county. That part of Hill avenue lying northerly of Bay street has never been worked or traveled, and until the erection of the coal dock hereinafter referred to there was no settlement or travel that required it to be worked.

On the 12th day of January, 1881, the makers of the plat had united in the conveyance of a right of way to the Northern Pacific Railway Company 100 feet in width, covered by the waters of the St. Louis river or the Bay of Superior, the location of which right of way is indicated on Exhibit 2 and marked "Northern Pacific Right of Way." Shortly after the conveyance the railroad was completed thereon and ever since that time it has been operated over the center of the strip of land so conveyed. The rails were first laid on trestles, and thereafter the right of way was filled in, so that at the time of the commencement of this action there was but little water between the railroad track and the shore.



ESSENTIAL PART OF EXHIBIT A

On the 11th day of December, 1885, Lisette Roy, being the owner of the land lying between Water street and the Bay of Superior, sold the same to Stanley Dwight, and on December 31, 1885, Stanley Dwight conveyed the same to the Land



& River Improvement Company. On November 12, 1900, the Land & River Company, being the successor of the Land & River Improvement Company, having acquired title to all of the lands lying north of Roy's Addition in section 14, caused a plat of said lands and the lands which it had acquired from Lisette Roy to be made and filed. This plat is

known as Sweetzer's Division, Exhibit 2, the essential part of which is shown in the diagram on page 635. This plat was duly accepted by resolution of the board of public works of the city of *Superior* and certified by its city clerk. Point A on Exhibit 2 corresponds to point A on Exhibit A, and point B on Exhibit 2 corresponds to point B on Exhibit A. After the plat had been made and filed and accepted by the city of *Superior* in February, 1901, the *Northwestern Fuel Company* (hereinafter called the *Fuel Company*) purchased from the Land & River Company blocks 503 and 504 and other lands according to the Sweetzer Division plat. The court found that there was no evidence in the case as to whether or not the officers of the defendant *Fuel Company* had actual knowledge of the existence of Roy's plat or of any claim on the part of the city of *Superior* or the public to Superior street or Hill avenue or any riparian rights of the city or public to lands extending beyond said Hill avenue from the shore. Immediately after the purchase of the property the *Fuel Company* commenced to make very extensive improvements by erecting coal docks at an expense of several hundred thousand dollars.

On March 14, 1902, the city of *Superior* entered into a contract with the *Fuel Company* for the temporary erection and maintenance of a sewer over and across lot 6 of block 504, in which it was recited and stated that the defendant *Fuel Company* was the owner of all the lands conveyed to it by the Land & River Company, the city, however, having the right to occupy a designated part of the same for sewer purposes. After the *Fuel Company* had purchased the land in question the city of *Superior* assessed it and levied taxes thereon, which the defendant *Fuel Company* paid. In October, 1905, the present action was begun by the Northwestern Coal & Dock Company, and the city of *Superior* and the defendant *Fuel Company* were made parties defendant. The defendant city answered February 6, 1906, and then asserted for the first

time the claim that, Hill avenue having been platted and laid out and opened to the shore or water line of the St. Louis river or Bay of Superior, the same had been dedicated to public use; that such dedication had been accepted by the city of *Superior,* and that all the rights and privileges appurtenant thereto were then vested in and belonged to the city of *Superior,* and that the city of *Superior* had the exclusive right and privilege, by reason of the dedication thereof to a public use, to hold, maintain, occupy, and improve the submerged land or water overflowing the same in front of Hill avenue and the full width thereof from its terminus on the shore or bank of the St. Louis river or Bay of Superior to the established dock line in front of the same. The premises affected by the claim of the city of *Superior* correspond in a general way to lot 1 of block 504 as it appears on Exhibit 2. The *Fuel Company* answered denying the right of the city of *Superior* to the property in question for the uses stated, and alleged that Hill avenue was never legally laid out or dedicated and that the city of *Superior* was estopped by reason of the platting of said Sweetzer Division, the acceptance and recording thereof, the purchase by the defendant of the property mentioned, and by the improvement thereof, from setting up any claim to any part of Hill avenue beyond the southwest end of lot 1 of block 504.

The issue thus made up was tried before the court. Findings were made embodying the facts as stated and other facts which will be referred to in the opinion; and the judgment of the court established a right of way in the public in Hill avenue or Superior street to the bay or river shore and from that point to the thread of the stream of the St. Louis river, the same to be bounded by dropping lines at right angles to the thread of the stream so that they will strike the boundary lines of Superior street as they reach the shore line as shown on Roy's plat, which lines were fifty feet apart measured at right angles to the street, the westerly street line being also

the section line between sections 13 and 14. The boundaries of the street as established over the submerged portions of the land would correspond in a general way with lot 1 of block 504 as shown on Exhibit 2.

From a judgment entered in accordance with the findings and a stipulation of the parties the *Fuel Company* appeals.

For the appellant there was a brief by *Luse, Powell & Luse,* attorneys, and *A. E. Boyesen,* of counsel, and oral argument by *L. K. Luse* and *C. Z. Luse.*

For the respondent the cause was submitted on the brief of *H. V. Gard* and *T. L. McIntosh.*

ROSENBERRY, J. It is claimed that the making, acknowledging, certifying, and filing of the plat known as Roy's Addition (Exhibit A) did not amount to a statutory dedication for the reason that the makers thereof did not comply with the statutes relating thereto. At the time the plat was executed secs. 2260 to 2264, R. S. 1878, were in force. So far as material they are as follows:

"Section 2260. Any person owning any tract of land, wherever situated, wishing to divide the same into lots, streets and alleys, for the purpose of sale or assessment or both, may cause the same to be accurately surveyed and divided into lots, or lots and blocks, streets and alleys, commons or public grounds as he may choose. The boundaries of all lots containing an area of more than one acre, and of all blocks, streets and alleys, shall be marked and established in the field by suitable monuments, placed at all the corners of each such lot and block, and at the beginning and terminus of each street and at every angle of a street."

"Section 2261. The following requirements shall be fully complied with to entitle a map made under the provisions of the preceding section to be recorded:

"First. On the face of the map it shall appear: . . .

"3. The length and courses of all exterior boundary lines and of the boundary lines of all lots or other subdivisions designated on the map and the center line of all streets, when

such center line is not used as a boundary line, shall be noted in their proper places.

"4. All monuments erected in the field must be represented in their proper places thereon, and the kind of material of which such monument is composed noted at the representation thereof. . . .

"Second. On the back of every such map offered for record shall appear and be written the certificate of the surveyor who surveyed and mapped the land, . . ."

The plat is said to be deficient in the following respects: (1) The center lines of the streets do not appear on the face of the map. (2) The map does not show that monuments were placed at the beginning and terminus of each street, and the kind of material of which the monuments were constructed. (3) The respective ownerships are not properly indicated on the map.

The original map was not introduced in evidence, but in lieu thereof a certified copy of the record thereof in the office of the register of deeds was offered and received. Upon the map is a legend describing in great detail the lands platted, the courses and distances of the boundaries, the size and location of the lots, the manner in which the beginnings and termini of the streets were indicated, the location of monuments, the dimensions and locations of alleys, and the material of which monuments were constructed; so that by the aid of the legend every material fact required by the statute to be exhibited upon the map can be definitely ascertained and located. The certificate of the surveyor was full and complete, and he certified that he had fully complied with the provisions of ch. 101 of the Revised Statutes of 1878 in surveying, subdividing, and mapping the said premises. The original not being produced, we must assume that the original map was in accordance with the record. However, we are of the opinion that the map, the legend thereon, and the certificate of the surveyor must be taken together, and that when so considered they constitute a substantial compliance

with the requirements of the statute, and that therefore there was a statutory dedication of the lands embraced within the plat known as Roy's Addition.

It furthermore appears from the map and legend that it was the intention of the plattors to extend Superior street to the southwesterly shore of the St. Louis river or Bay of Superior. In describing that part of the exterior boundary beginning at the point where the northeasterly line of Water street intersects the easterly line of Superior street or Hill avenue (Exhibit A), the legend says: "thence north 270 feet to the Bay of Superior, thence running northwesterly along said bay 80 feet, thence south 3,300 feet." There could have been no other purpose in the making of this jog than to extend Superior street (Hill avenue) north to the southwesterly shore of the Bay of Superior or the St. Louis river.

Under well established principles of law, the street being thus dedicated to the shore line of the river, the public became vested with the right to pass over that part of the submerged land lying between the shore and the dock line as established by the United States, the boundaries of said strip to be determined by dropping lines at right angles to the thread of the stream to the points where the boundaries of Hill avenue intersected the shore of the river. It is thus clear that the city had the right claimed by it to the strip in question, and the judgment must be sustained unless the city is estopped by its conduct from now asserting that right to the disadvantage of the defendant. This court has said:

"It was contended that the city was not estopped under the circumstances from opening the street; that the city officers could not alienate the public rights; and that neither neglect nor positive acts of disclaimer *in pais* would lay the foundation for an equitable estoppel against the rights of the public, and very many authorities were cited to that effect. The city authorities have charge of and represent the rights of the public in and to the public streets, and it has been held, and we think with great reason, that under circumstances such as are

presented the city and its officers will be held bound by an estoppel *in pais,* to prevent injustice, from insisting upon and exercising as against the present plaintiff the rights acquired by the recorded plats." *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 459, 61 N. W. 1108.

The court also approved of the law as stated by Dillon (Mun. Corp. sec. 675), as follows:

"While the [municipal] 'corporation does not own and cannot alienate the public streets or places, and no mere laches on its part or on the part of its officers can defeat the right of the public thereto; yet there may grow up, in consequence, private rights of more persuasive force in the particular case than those of the public.' . . . 'It will perhaps be found that cases sometimes arise of such a character that justice requires that an equitable estoppel should be asserted even against the public.' . . . 'There is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, as this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the case to hold the public estopped or not, as right and justice may require.' " *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 460, 61 N. W. 1108.

See, also, *Racine v. C. & N. W. R. Co.* 92 Wis. 118, 65 N. W. 857; *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101; *Davis v. Appleton,* 109 Wis. 580, 85 N. W. 515; *Ashland v. N. P. R. Co.* 119 Wis. 204, 96 N. W. 688; *Arnold v. Volkman,* 123 Wis. 54, 101 N. W. 158.

In order that an estoppel *in pais* may arise there must be (1) inequitable conduct on the part of the city, and (2) irreparable injury to parties honestly and in good faith acting in reliance thereon.

In addition to the fact that the city had never used or occupied that part of Hill avenue lying north of the northerly line of Bay street and that the same had never been opened for public travel, it appears that in 1900, upon the application of the Land & River Company, the city solemnly accepted a plat of the premises in question, replatting the premises in-

volved in this action, and in its whole extent no doubt conferring many valuable rights upon the public by way of dedication. It is hardly to be supposed that the city authorities did this without sufficient consideration, and no doubt for the reason that, balancing the gains against the losses, if any, they thought the public interest would be promoted by the acceptance of the plat of Sweetzer's Division. After the plat of Sweetzer's Division had been approved by the public authorities and recorded as required by law, the *Fuel Company* purchased blocks 503 and 504 in accordance with the plat of the Sweetzer Division and in reliance upon it. Further relying upon this affirmative conduct on the part of the city, the *Fuel Company* commenced the erection of very valuable and expensive improvements upon the property in question. Two years thereafter the city, dealing with the *Fuel Company,* acknowledged the ownership of the *Fuel Company,* and in fact never asserted any rights as against the *Fuel Company* until it was brought into court by a third party.

The trial court found that the improvements made by the defendant upon said property consisted of a large coal dock constructed at an expense of several hundred thousand dollars. While it was stipulated by the parties that if the plaintiff should recover in this action it should be entitled, in lieu of the riparian rights extending out from Hill avenue, to the same rights, privileges, and easements or public way to and over submerged land in lots 1 and 2 in block 503, that fact cannot be considered in the determination of the issues in this case. The determination of this case must be based upon the facts as they existed at the time the action was begun. If upon these facts the city is entitled to judgment, then its rights are by the stipulation to be transferred to lots 1 and 2 of block 503.

While the improvements placed upon lot 1 of block 504 prior to the making of the stipulation were not of themselves extensive, the improvements placed upon the remainder of

the property were extensive and of such a character that material and important changes in the plant would be made necessary by the opening of a waterway through the property which should be traveled and used by the public, resulting in damage to the *Fuel Company* estimated at the sum of $100,000, in addition to permanently impairing its usefulness. We think the facts in this case bring it clearly within the rule stated in *Paine L. Co. v. Oshkosh,* 89 Wis. 449, 61 N. W. 1108, and that the city of *Superior,* by reason of its acceptance of the plat, recognition of the *Fuel Company's* rights therein, permitting improvements of an extensive and valuable character to be made thereon without objection, and taxing the property as if owned by the *Fuel Company,* is estopped, in view of the nature and character of the improvements made in reliance upon the conduct of the city, from asserting any interest in any part of the premises owned by the *Fuel Company* on account of any rights the city or the public may have acquired by reason of the extension of Superior street or Hill avenue to the shore line of the river as shown in the plat of Roy's Addition.

By the Court.—Judgment reversed, with directions to the trial court to enter judgment for the *Northwestern Fuel Company* confirming its title to blocks 503 and 504, Sweetzer's Division, free and clear of any interest or claim therein on the part of the city of *Superior* or the public by reason of the extension of Superior street or Hill avenue to the shore line of the St. Louis river or the Bay of Superior as shown in the plat of Roy's Addition.

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2. Had the settlement agreement been such that plaintiff accepted the mere promise of defendant to pay a certain sum in full accord and satisfaction, then only an action on that promise could be maintained. *Ibid.*
3. It was not error in such case to admit evidence of conversations between plaintiff and an agent who had acted for defendant in the transaction, relating either to what the settlement agreement was or to the question whether it had been executed. *Ibid.*

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1. A contract under which it is claimed that a foster-child, not legally adopted, is entitled to the rights of an heir at law of the foster-parents should not be specifically enforced so as to give the child those rights unless, in its terms and meaning, such contract is so clearly established as to show, without room for fair doubt, that the parties to it intended the child to have the right of inheritance claimed. *Winke v. Olson,* 427

2. Plaintiff's father, a widower, placed her in the care and keeping of one G. and his wife, pursuant to a written instrument by the terms of which they were to have her "forever and all her time and privileges," he promising on his part that they should "be the parents of said child," and they agreeing and binding themselves "to care for said child in a parental manner and to enjoy all of the privileges of a child as if born" to them, and "to do our utmost to care for her as if our own child." No promise was made therein to adopt the child, nor was any reference made to property rights. *Held,* that such instrument did not, either in itself or in the light of all the surrounding circumstances, contain a promise or clearly show an intention on the part of G. and his wife that the child should have the right to inherit their property. *Ibid.*

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2. Sec. 2836*a*, Stats., cannot be construed as validating an attempted appeal taken from a judgment before such judgment was entered. *Moudry v. Patrick Cudahy Family Co.* 510

Right of review: Waiver.

3. Where a defendant elected, when given an option by the trial court, to submit to a judgment against it for a small sum and so terminate the litigation, and afterwards caused such judgment to be entered, it thereby waived the right to object, on plaintiff's appeal, to the judgment or the amount of the damages. *LeBeau v. Minneapolis, St. P. & S. S. M. R. Co.* 30

Same: Questions not raised below: Exceptions.

4. Questions not raised in the trial court will not ordinarily be considered on appeal to the supreme court. *Will of Brandon,* 387
5. A finding of fact by the trial court which was not excepted to will not be reviewed on appeal; nor can questions of fact which were not raised or litigated in the trial court be raised for the first time in the supreme court. *Frankfort Gen. Ins. Co. v. Milwaukee,* 77

Stay of proceedings: Bonds.

6. An order refusing to quash a writ of *mandamus*, overruling a demurrer to the relation, and giving the defendant time to plead over, is such an order as is contemplated by sec. 3060, Stats., and an appeal therefrom does not operate to stay proceedings except as provided in said section. *State ex rel. Pabst Brewing Co. v. Kotecki,* 69
7. Sec. 925—269*m*, Stats.,—exempting city officers, in actions against them in their official capacity, from giving bonds on appeal,—does not operate to stay proceedings pending an appeal in such an action unless a stay is specifically ordered by the court. *Ibid.*

Review: Presumptions in support of judgment.

8. In reviewing on appeal the result of a trial, the presumption that the original jurisdiction applied correct rules of law should prevail unless the contrary clearly appears. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 65

9. In considering, on appeal, whether the trial jurisdiction efficiently erred as to any matter of law or fact, the result in such jurisdiction should not be disturbed unless clearly wrong. *Ibid.*

10. Even if sub. 6, sec. 1809, Stats., applies only to claims for personal injuries or death—a point not decided,—yet in an action for injuries to person and property where the jury found that plaintiff was not guilty of gross negligence and the defendant railway company made no request for a finding as to any other degree of negligence on plaintiff's part, it will be presumed, under sec. 2858*m*, in support of a judgment by which plaintiff recovered for the injury to property, that the trial court found that he was not guilty of a slight want of ordinary care. *Kaufmann v. Chicago, M. & St. P. R. Co.* 359

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11. The verdict of a jury cannot be disturbed on appeal if there is any credible evidence to support it. *Scheuer v. Manitowoc & N. T. Co.* 333

12. The submission of the issues for special verdict is in this case *held* entitled to little weight as a decision by the trial court that conflicting inferences might be drawn from the evidence, that court having thereafter changed or set aside the jury's findings that defendant was negligent and plaintiff free from contributory negligence and having clearly stated in a written opinion that such findings were unwarranted because the undisputed facts established the contrary as a matter of law. *Vannatta v. Lancaster Light & P. Co.* 344

13. Findings of fact by a trial court are, in general, to be deemed verities on appeal unless they satisfactorily appear to be contrary to the clear preponderance of the evidence. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 65

14. In determining whether findings of fact are contrary to the clear preponderance of the evidence, regard should be had to the superior advantages which a trial court has for determining the weight of evidence. *Ibid.*

15. The rule as to necessity of a clear preponderance of the evidence against findings of fact to warrant disturbing them, does not apply if it satisfactorily appears that some error of law efficiently influenced the result. *Ibid.*

16. The rule that a finding of fact made by a trial court will not be disturbed on appeal unless contrary to the clear preponderance of the evidence does not mean that such finding must necessarily be sustained if there is some evidence which, if not controverted, would support it. *Krahn v. Goodrich,* 600

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18. Where in an action for injuries to an employee the absence of actionable negligence on the defendant's part is established by the evidence and verdict, questions of the special verdict relat-

ing to proximate cause and to damages are immaterial, and errors in the submission of such questions or in the instructions relating thereto are not prejudicial to plaintiff. *Kolasinski v. Chicago, M. & St. P. R. Co.* 50

19. Where a finding by the court is supported by competent evidence, the admission of incompetent evidence on the subject is not sufficient to work a reversal of a judgment based on such finding. *A. & S. Wilson Co. v. Matthews Brothers Mfg. Co.* 152

20. The mere irrelevancy, under the proof, of an instruction to the jury is not ground for reversal, if it was not prejudicial and the jury was not misled by it. *Adams v. State,* 223

21. The admission of incompetent evidence is not a prejudicial error where, even if it had been excluded, the jury would in all probability have reached the same result. *Milwaukee S. T. & D. Co. v. American Cent. Ins. Co.* 298

22. There being other uncontradicted evidence that the value of plaintiff's horse, which was killed, was as found by the jury, there was no prejudicial error in permitting plaintiff to testify, in respect to its value at the time it was killed, that he had been offered $225 for it. *Scheuer v. Manitowoc & N. T. Co.* 333

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23. Plaintiff's evidence at two trials having been substantially the same and insufficient to establish a cause of action, and there being no probability of new evidence at another trial, upon reversal of a judgment in her favor the dismissal of the action is directed. *Gardner v. Chicago & M. E. R. Co.* 541

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24. General rules relating to appeals *held* applicable to appeals from the Milwaukee civil court. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 65

25. Under sec. 28, ch. 549, Laws 1909, as amended by ch. 320, Laws 1913, an appeal from a judgment of the Milwaukee civil court to the circuit court cannot be taken before the judgment is entered. *Moudry v. Patrick Cudahy Family Co.* 510

26. An order of the circuit court unqualifiedly reversing a judgment of the Milwaukee civil court and granting a new trial on all issues necessarily vacates all the findings of the civil court. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 65

Appeal from county court. See EXECUTORS, 1, 2.

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ARBITRATION: Building contract. See CONTRACTS, 7–9.

ARCHITECT'S CERTIFICATE. See CONTRACTS, 10.

ARGUMENT OF COUNSEL. See NEGLIGENCE, 10.

ASSIGNATION HOUSES. See NUISANCES.

ASSIGNMENT of cause of action. See WORKMEN'S COMPENSATION, 2.

ATTORNEY AND CLIENT. See DISMISSAL AND NONSUIT, 3, 4.

AUTOMOBILES.

Sale: Delivery. See SALES, 5.

Rights on highways. See MUNICIPAL CORPORATIONS, 3.

Collisions: Negligence.

1. In an action for injuries sustained in a collision between plaintiff's bicycle and defendant's automobile, the questions of defendant's negligence and plaintiff's contributory negligence are *held* to have been for the jury. *Friedrich v. Boulton,* 526
2. In such a case plaintiff cannot be said, as a matter of law, to have been negligent in riding his bicycle on a path eleven feet from the right-hand curb, if the other parts of the street afforded ample space for all other vehicles and travelers to use the street without colliding with him, although a city ordinance required that he "keep to the right and as near the right-hand curb as possible." *Ibid.*

Same: Speed limit.

3. The speed at which an automobile might lawfully be driven when meeting another vehicle on a public highway where the traveled track was less than twenty feet wide, was governed by ch. 170, Laws 1915, from the time that act took effect (May 31, 1915) until its repeal on August 20, 1915, by ch. 557, Laws 1915, although a different provision is found in sec. 1636—49*a*, Stats. (Laws 1913, ch. 138). *Christl v. Hauert,* 624
4. Upon the evidence in this case the question whether defendant was exceeding the statutory speed limit when his automobile collided with plaintiff's car, is *held* to have been one for the jury. *Ibid.*

BALLOTS: Official: Preservation: Recount. See ELECTIONS, 1, 13-15.

BANKRUPTCY.

As affecting executory contracts. See CONTRACTS, 12, 13.

Debts provable: Tort claim for injuries.

An unliquidated tort claim against an employer for injuries to an employee, not reduced to judgment until after the employer had been adjudged a bankrupt, was not a debt provable in the bankruptcy proceedings, and the trustee in bankruptcy took no title to an indemnity policy insuring the employer against loss from the liability imposed by law on account of such injuries. *Eberlein v. Fidelity & Deposit Co.* 242

BANKS AND BANKING. See BILLS AND NOTES, 2-4.

BAPTISMAL CERTIFICATE. See EVIDENCE, 3.

BAWDY HOUSE. See NUISANCES.

BICYCLES. See AUTOMOBILES, 1, 2.

BILL OF LADING: Deposit: Passing title. See CARRIERS, 3, 5.

BILLS AND NOTES.

Validity: Estoppel. See EXECUTORS, 4, 5.

As "obligations" and "indebtedness." See PRINCIPAL AND SURETY, 2.

Payment in notes. See PRINCIPAL AND SURETY, 5, 6.

Conditional delivery: Uncompleted contract: Holder in due course.

1. In an action upon a promissory note the answer is *held* not to admit that the note was given in consummation of a completed purchase by defendant of certain corporate stock, but in effect to allege a conditional delivery of the note under an arrangement by which it was to be returned to him if he decided not to buy the stock; and there was no fatal variance between such answer and defendant's testimony although the latter showed that the agreement actually made was expressed in different words than those alleged. *Union Inv. Co. v. Epley,* 438

2. A finding by the trial court in such action that the note in suit, together with a stock certificate issued in defendant's name and assigned by him in blank, was left with the cashier of the bank to which the note was payable (who was also the president of the corporation issuing said stock) to be held by him until defendant decided whether or not he would purchase the stock, and that the note was to be returned to defendant if he decided not to make the purchase, is *held* to be sustained by the evidence. *Ibid.*

3. Under the circumstances stated the note did not become a complete contract *in præsenti*, and defendant was entitled to its return upon notifying said cashier of his election not to purchase the stock. *Ibid.*

4. The payee bank, in such case, was chargeable with the knowledge which its cashier had of the incomplete and revocable character of the note, and the delivery of the note by the cashier to the bank, which thereupon credited it to the corporation whose stock was involved in the transaction, did not render the bank a holder in due course. *Ibid.*

Accommodation makers: Presentment for payment, etc. See EXECUTORS, 4.

5. Neither presentment of a note for payment nor notice of dishonor is necessary to charge an accommodation maker with liability. *Schoenwetter v. Schoenwetter,* 131

Payment: To whom may be made.

6. Payment of a negotiable instrument must be made to the person having possession of the same or to some person duly authorized to accept payment; and where payment is made to a person not in possession of the instrument the burden is upon the payor to show the authority of such person by clear and satisfactory evidence. *Connell v. Kaukauna,* 471

BIRTH: Evidence of date: Baptismal certificate. See EVIDENCE, 3.

BONDS. See MECHANICS' LIENS, 2, 3. PRINCIPAL AND SURETY. PUBLIC UTILITIES, 3–11. SALES, 1–4. TRUSTS AND TRUSTEES, 3–5.

BOUNTIES. See ANIMALS. OFFICERS, 2, 3.

BOXING CONTEST: Violation of rules. See CONTRACTS, 15.

BRIDGES. See ELECTRICITY. HIGHWAYS AND BRIDGES.

BROKERS. See FRAUD, 2–5.

BUILDING AND LOAN ASSOCIATIONS.

Sec. 2014—10, Stats. 1915, provides for but one contingent fund, which fund must be kept intact and cannot be apportioned and paid on stock of a matured series. *Bohemian Mut. L. & B. Asso. v. Kuolt,* 581

BUILDING CONTRACTS. See CONTRACTS, 7–10. PRINCIPAL AND SURETY, 4–8.

BULK SALE LAW. See FRAUDULENT CONVEYANCES, 3–6.

BURDEN OF PROOF. See BILLS AND NOTES, 6. INFANTS, 2. NAVIGABLE WATERS, 5. PRINCIPAL AND SURETY, 4.

CALLS on stock subscriptions. See CORPORATIONS, 3.

CANVASS OF VOTES. See ELECTIONS, 13–15.

CARRIERS.

Carriage of goods: Embargo: Car-service rules: Demurrage: Service in connection with transportation.

1. Upon being refused cars for pulp wood because of an embargo thereon, a shipper ordered cars for loading tan bark, but loaded them with pulp wood and demanded acceptance of the shipment. The railway company refused to accept the cars and demanded that they be unloaded. The shipper refused to unload, and the railway company did not remove the pulp wood from the cars, but after the embargo had been raised accepted the shipment for transportation. *Held,* that the cars were not used in transportation, within the meaning of sec. 1794—4, Stats., until the acceptance of the shipment, and hence were not subject to a demurrage charge for the time they were held on the tracks before such acceptance. *Chicago & N. W. R. Co. v. Pulp Wood Co.* 200
2. The service of such cars prior to the two days' free time allowed for loading them under the car-service rules was not a service in connection with transportation as contemplated by sec. 1797—4, Stats. *Ibid.*

Carriage of building material: Right to lien on building. See MECHANICS' LIENS, 3.

Bill of lading: Deposit with carrier: Title to goods: Right of stoppage in transitu: Conversion by carrier.

3. As between the consignee of grain and the carrier, a deposit of the bill of lading by the consignee, pursuant to custom, with the agent of the carrier on the board of trade at the point of destination was a mere matter of business convenience and did not pass the title to the carrier. *Bell v. C. & N. W. R. Co.* 277
4. A consignee of goods who, after their arrival and after he has paid for and obtained the bill of lading, sells them to another has, as vendor and as against the carrier, the right of stoppage *in transitu* until the goods arrive in the possession, actual or constructive, of the purchaser. *Ibid.*
5. After depositing the bill of lading with defendant's board of trade agent, plaintiffs sold to one G. a carload of oats which had been shipped to them over defendant's railway, and gave G. a written order for the car. Such order was by mistake addressed to another railway company, and G. presented it to that company, which issued to him a new bill of lading. On the following day plaintiffs, having learned that the check given to them by G.

was worthless, notified defendant to hold and not to deliver the car. Defendant afterwards, at the request of the other railway company, delivered the car to it, and subsequently delivered the original bill of lading to plaintiffs. *Held* that, the original bill of lading not having come to the possession of G., he had no such actual or constructive possession of the car as precluded plaintiffs from exercising, as they did, their right of stoppage *in transitu* while the car was still held by defendant. *Ibid.*

6. Although the action against the defendant railway company was in form for a breach of the contract of carriage, judgment as for a conversion of the goods was properly rendered in accordance with the facts disclosed on the trial. *Ibid.*

Carriage of passengers: Carrying beyond destination: Injury: Proximate cause.

7. Where a woman, who had by negligence of a railway company been carried to a station five miles beyond her destination, unnecessarily and unreasonably walked back that distance in the snow on a cold and stormy day, and as a result thereof became ill, it is *held* that such result was caused by her own voluntary and negligent act and was not proximately related to the negligent act of the railway company. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, distinguished. *LeBeau v. Minneapolis, St. P. & S. S. M. R. Co.* 30

Same: Injury to intending passenger trying to stop interurban car: Contributory negligence.

8. Plaintiff, an able-bodied man forty-five years of age, with good eyesight and in possession of all his faculties, attempted, in a customary way, to signal an interurban car at night, at a highway crossing, by lighting matches and holding them near the track. As the car drew near, he stepped back to what he thought was a safe distance. The car did not stop, and as it was passing he was either struck by, drawn under, or stumbled against the car and was injured. He had watched the approach of the car through a distance of two blocks or more and knew that it had an overhang of about three feet. Assuming, but not deciding, that he was a passenger, it is *held* as a matter of law that he was guilty of contributory negligence in standing so close to the car. *Schildt v. Johnson,* 102

Same: Injury to passenger alighting from interurban car: Defective car step: Negligence.

9. In an action for injuries sustained in alighting from an interurban car, plaintiff's testimony that the heel of her right foot sank into or caught in something on the first step down from the platform of the car, causing her to fall, and that she did not slip, was insufficient, in the absence of any other evidence of a defect in the car step, to show any negligence of defendants. *Gardner v. Chicago & M. E. R. Co.* 541

10. Findings by the jury in such case that the car step was out of repair and that defendants in the exercise of ordinary care ought to have discovered its defective condition in time to have prevented the injury to plaintiff, are *held* to rest upon conjecture. *Ibid.*

11. Plaintiff being a woman about forty-six years old, in good health, and burdened only with a light handbag when she fell, and the car being standing still at a terminal station, no duty devolved upon defendants to assist her in alighting. *Ibid.*

CAUSE OF ACTION: Assignment. See WORKMEN'S COMPENSATION, 2.
CERTIFICATES issued for bounties: Discounting. See OFFICERS, 2, 3.
CERTIORARI. See COURTS, 3, 4. TAXATION, 1.
CHANGE OF VENUE. See COURTS, 5.
CHATTEL MORTGAGES. See INSURANCE, 12. MECHANICS' LIENS, 6.
CIRCUIT COURTS. See COURTS, 5–9. JUDGES.
CITIES. See MUNICIPAL CORPORATIONS. PUBLIC UTILITIES.
CIVIL COURT. See APPEAL, 24–26.
CLAIMS.
Against counties. See COUNTIES.
Against cities. See MANDAMUS, 4, 5.
Against decedents. See EXECUTORS, 6, 7. HOMESTEADS. HUSBAND AND WIFE, 4–7. JUDGMENT, 5, 6.
For liens: Notice. See MECHANICS' LIENS, 4, 5.
CLASSIFICATION. See CONSTITUTIONAL LAW, 3. HIGHWAYS AND BRIDGES, 8.
COLLEGES AND UNIVERSITIES: Right of students to vote. See ELECTIONS, 5–12.
COLLISIONS. See AUTOMOBILES. NEGLIGENCE, 7–10. RAILROADS, 5–11.
COMMISSIONS on sale of land. See FRAUD, 2–5.
COMMON CARRIERS. See CARRIERS.
COMMON SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.
COMPENSATION for injuries. See WORKMEN'S COMPENSATION.
COMPLAINT. See PLEADING.
COMPROMISE AND SETTLEMENT. See ACCORD AND SATISFACTION. HUSBAND AND WIFE, 5. PRINCIPAL AND SURETY, 7.
CONDEMNATION of land, etc. See MORTGAGES, 1. PUBLIC UTILITIES.
CONDITIONAL DELIVERY. See BILLS AND NOTES, 1–4.
CONDITIONS PRECEDENT. See CONTRACTS, 3, 4, 7, 10. CREDITORS' SUIT, 1. DEEDS, 3–6. HIGHWAYS AND BRIDGES, 15. INSURANCE, 4–7, 15, 16.
CONDITIONS SUBSEQUENT. See DEEDS, 1, 2, 5, 6.
CONFLICT OF LAWS. See DIVORCE, 5–7.
CONSIDERATION. See EXECUTORS, 4.
CONSOLIDATION of actions. See ACTION.

CONSTITUTIONAL LAW.

Unconstitutional statute a nullity. See STATUTES, 1.

Legislative power: Limiting hours of labor on public works.

1. The state has power to limit (as by sec. 1729*m*, Stats., it has limited) the hours of labor on public buildings or works contracted for by the state or any officer or agent thereof. *Milwaukee v. Raulf*, 172
2. Such limitation of the hours of labor is not an exercise of the police power, but of a power incidental to and inherent in the right of the state to contract for public works and to specify the conditions under which labor upon public works shall be performed. *Ibid.*

Same: Delegation. See HIGHWAYS AND BRIDGES, 6, 7, 10. NAVIGABLE WATERS, 4.

3. Sec. 1728—2, Stats. 1915, is construed as laying down the general rule that women shall not be permitted to work in any place for such a period of time as shall be prejudicial to their health, and authorizing the industrial commission upon investigation to determine as a fact what class or classes of employment are dangerous or prejudicial to the life, health, safety, or welfare of females, and to determine as a fact how long females may be engaged in the several classes of employment reasonably without danger or prejudice to the life, health, safety, or welfare of such females, and to establish by general orders such classification and the time which females may labor therein, so found. So construed and to that extent the statute does not attempt unlawfully to delegate legislative power to the commission, and is valid. *State v. Lange Canning Co.* 228

Local legislative and administrative powers. See HIGHWAYS AND BRIDGES, 9.

Police power. See CONSTITUTIONAL LAW, 2. FRAUDULENT CONVEYANCES, 3. MUNICIPAL CORPORATIONS, 3. NUISANCES, 2.

Obligation of contracts. See TAXATION, 11.

Equal protection of the laws. See COURTS, 10.

Remedy for wrongs. See COURTS, 10.

Judgments: Faith and credit. See DIVORCE, 5–7.

Circuit judges: Removal: Shortening term. See JUDGES.

Justices' courts: Jurisdiction. See COURTS, 10.

Election laws. See ELECTIONS, 4.

Eminent domain. See PUBLIC UTILITIES, 3.

Taxation: Uniformity in rule. See HIGHWAYS AND BRIDGES, 10.

Town and county government: Uniformity. See HIGHWAYS AND BRIDGES, 8.

CONTINGENT FUND. See BUILDING AND LOAN ASSOCIATIONS.

CONTRACTS.

When complete: Proposal and acceptance. See BILLS AND NOTES, 1–4. INSURANCE, 1–8. MASTER AND SERVANT, 1.

Validity: Public policy. See CORPORATIONS, 6–9. HUSBAND AND WIFE, 1.

For benefit of third person: Consideration: Privity. See INSURANCE, 14.

1. When a person for a valuable consideration paid to him by another agrees to pay or cause to be paid a sum of money to a third person, a stranger to the transaction, the latter thereby becomes possessed of the absolute right to the benefit of the promise, and a right of action thereby accrues to him against the promisor. *Sedgwick v. Blanchard,* 421
2. The fact that the payment was to be in land and not in money does not affect the rule above stated. *Ibid.*
3. Where, by a written contract between father and son, the father agreed, in consideration of future support, etc., to convey certain land to the son by deed to become effective at the father's death, and also to convey certain other land to a daughter who was not a party to the contract, but after performance for some

years by the son the father conveyed to him both tracts of land upon condition that he pay a certain sum of money to the daughter, the latter was entitled, after her father's death, to compel the son to convey to her the land which he secured through a breach of the original contract. *Ibid.*

4. If one person, for a consideration moving to him from another, agrees to pay a sum of money to a third person, the law creates the essential of privity between him and the third person, making a binding contract between them which cannot be impaired by any subsequent agreement between the two persons first mentioned without the third person's consent; but where the promise to pay is conditional it will wait upon the condition being satisfied, and if the time set therefor lapses without such satisfaction occurring the promise falls with it. *Krahn v. Goodrich*, 600

Restraint of trade, etc.: Validity.

5. Contracts imposing reasonable restraint upon the right to exercise one's calling, trade, or profession are valid. *Madson v. Johnson*, 612

6. A contract by which defendant, upon selling to plaintiff his real estate, office fixtures, and good will as a veterinarian, agreed that he would not practice that profession "in Appleton or vicinity" unless he purchased plaintiff's veterinary practice or entered into a partnership with him, imposed only a reasonable restraint and was valid. *Ibid.*

Contracts for public works: Limitation of hours of labor: Letting to lowest bidder. See CONSTITUTIONAL LAW, 1, 2. MUNICIPAL CORPORATIONS, 8.

Construction. See ADOPTION, 2, 3. CORPORATIONS, 1. MASTER AND SERVANT, 5, 6, 8. PRINCIPAL AND SURETY, 2–6. SALES, 1–4. VENDOR AND PURCHASER.

Same: Building contracts: Arbitration: Certificate of architect.

7. Where a building contract provides that any disagreement as to matters under it shall be adjusted by arbitration, but does not provide that arbitration shall precede an action on it, arbitration, if not requested, is not a condition precedent to the right to maintain such an action. *Quast v. Guetzkow*, 197

8. In such a case silence of the defendant on the subject of arbitration until after the commencement of the action, and failure thereof. *Ibid.*

to plead the matter in abatement or as a defense, was a waiver

9. Where no controversy arises as to matters within the scope of the arbitration clause in a contract, or where a controversy is settled by agreement of the parties, no reason exists for an arbitration. *Ibid.*

10. Where the owner accepted, as being in accordance with a building contract, the work done thereunder, and promised to pay an agreed sum therefor as a complete settlement, and thereafter remained silent as to the architect's certificate provided for in the contract until after an action was brought against him for said agreed sum, he is precluded both by waiver and by estoppel from defeating the action on the ground that the certificate had not been procured. *Ibid.*

Modification. See MASTER AND SERVANT, 1.

Reformation. See REFORMATION OF INSTRUMENTS.

Termination of executory contract: Bankruptcy of party.

11. Where one party to an executory contract repudiates it, or puts it out of his power to perform it, the other party may at his option treat it as terminated at once. *Kamps & Sacksteder D. Co. v. United D. Co.* 412

12. The involuntary bankruptcy of a party being the result of acts or omissions of the bankrupt and regarded in the law as the equivalent of a voluntary act disabling the bankrupt from performing his executory business contracts, the other party thereto may at once treat such contracts as terminated. *Ibid.*

13. The fact that in such a case the other party to an executory contract shared in a dividend or joined in a composition proceeding did not interfere with his right to treat the contract as terminated. *Ibid.*

14. A notification in such case that the contract (which was one of agency) would not be revived or continued in force until the account of the agent was entirely adjusted, amounted to an unequivocal declaration that the contract was terminated. *Ibid.*

Performance or breach. See SALES, 5.

15. One who contracted to box ten rounds under certain rules, but in the second round, in violation of those rules, struck a foul blow which disabled his opponent and thus made substantial performance of the contract impossible, cannot recover the contract price of his services, even though the violation of the rules was not deliberate. *Moha v. Hudson Boxing Club,* 425

Enforcing specific performance. See ADOPTION, 1.

Completion of contract by administrator of deceased party: Assumption of mortgage: Personal liability. See EXECUTORS, 6, 7.

Action for breach: Settlement of claim. See ACCORD AND SATISFACTION, 1, 2.

Same: Damages.

16. The agreement of a building contractor to accept $13,000 in notes payable $500 every three months was in effect an agreement to loan the owner $13,000; and for his breach of such agreement the contractor was liable for such damages as should have been reasonably in contemplation by both parties, when the agreement was made, as a probable result of a breach of it, including in this case commissions necessarily paid in procuring a loan from other sources and the difference between interest at the rate agreed upon and at the rate the owner was compelled to pay. *Lloyd Inv. Co. v. Illinois S. Co.* 282

Impairing obligation of contracts. See TAXATION, 11.

CONTRIBUTION. See NEGLIGENCE, 8.

CONTRIBUTORY NEGLIGENCE. See APPEAL, 12. AUTOMOBILES, 1, 2. CARRIERS, 7, 8. ELECTRICITY, 1. HIGHWAYS, 16–18. NEGLIGENCE, 3, 8. RAILROADS, 8–11.

CONVERSION of personal property. See CARRIERS, 6.

CONVEYANCES. See DEEDS. DIVORCE, 5–7. FRAUDULENT CONVEYANCES. INSURANCE, 12. TAXATION, 6, 7. TRUSTS AND TRUSTEES, 1–5.

CORPORATIONS.

Subscriptions to stock: Ambiguity: Instalments: Calls: False representations: Ratification.

1. A subscription for a certain number of "shares of the capital stock" of a corporation which issued both preferred and common stock cannot be held void for ambiguity or uncertainty where it appears that, at the time of signing, the subscriber knew that all of the common stock had been taken and that nothing but preferred remained. *Columbus Institute v. Conohan,* 219
2. In the absence of restrictions in its charter or the general law of the state, a corporation may accept and enforce stock subscriptions payable in instalments. *Ibid.*
3. Sec. 1754, Stats., providing for the making of calls by directors, is intended to fix the time of payment of a general subscription which fixes no time therefor; and where the subscription contract fixes such time a call by the directors is unnecessary. *Ibid.*
4. A representation, alleged to have been made to and relied upon by a subscriber for stock, that none but members of a certain fraternal order could buy stock or hold office in a corporation formed for the purpose of erecting a clubhouse, is *held,* even if made and false, to have been in this case immaterial. *Ibid.*
5. In such a case, payments on the subscription contract more than a year after it was made and after the subscriber had had ample opportunity to learn the facts, were a ratification of the contract. *Ibid.*

Sales of stock: Incomplete contract. See BILLS AND NOTES, 1–4.

Sales of stock by corporation for less than par value: Invalidity: Public policy.

6. A sale by a corporation of its theretofore unissued corporate stock for less than par value, being prohibited by sec. 1753, Stats., and in violation of the public policy of the state, is void. *Thronson v. Universal Mfg. Co.* 44
7. Both the purchaser and the corporation in such case are participants in an illegal transaction, and the former cannot have judicial aid to secure a rescission of the transaction and restoration of the consideration paid. *Ibid.*
8. In view of sub. 10, sec. 1770*b*, Stats., subjecting foreign corporations to the same restrictions that are imposed upon domestic corporations, the rules above stated are applicable to both. *Ibid.*
9. The fact that a foreign corporation so unlawfully selling its stock in this state has not been licensed to do business here does not debar it from the benefit of the public policy of the state which precludes a rescission of the sale at the suit of the purchaser, and it is the duty of the courts to enforce such policy whether invoked by a litigant or not. *Ibid.*

Dividends: Rescission: Evidence.

10. In an action by one corporation to recover from another certain dividends declared by the latter at a time when plaintiff owned all of its stock, findings of the court that, with plaintiff's consent, such dividends had been rescinded and the amount thereof transferred to the account of undivided earnings, to remain as

an asset of the defendant, are *held* to be supported by the evidence. *A. & S. Wilson Co. v. Matthews Brothers Mfg. Co.* 152

[11. Whether testimony of defendant's president that plaintiff's president (since deceased) agreed to such transfer from the dividend account to undivided earnings account, was incompetent under sec. 4069, Stats., and if so whether it was properly objected to, not decided.] *Ibid.*

Corporations under same management: Notice to one, when notice to the other. See PUBLIC UTILITIES, 6.

Foreign corporations: Unlicensed. See CORPORATIONS, 8, 9.

Municipal corporations. See MUNICIPAL CORPORATIONS.

COSTS.

In circuit court: "Recovery:" Counterclaim: Offsetting damages.

1. The word "recovery" as used in sec. 2918, Stats.,—providing that costs shall be allowed to the plaintiff upon a recovery in specified actions,—refers to the judgment in the action, not to the verdict. *Hartwig v. Eliason,* 331

2. Under secs. 2859, 2861, Stats., where a counterclaim is interposed in an action for money damages, there are never two recoveries, but only one, namely, the difference between the sums allowed by the jury or the court to the respective parties. *Ibid.*

3. Thus, in an action for slander, where defendant counterclaimed for libel and the jury found both the slander and the libel and assessed the damages of each party at six cents, the court properly offset the damages and rendered judgment for defendant for full costs, under sec. 2920, Stats., there being in such case no recovery by plaintiff within the meaning of sec. 2918. *Ibid.*

In supreme court: Separate appeals treated as one.

4. The six defendants who issued the insurance policies in suit having joined in answering the complaint, and the cause having been treated throughout as one in which they were united in interest, all being represented by the same attorneys and the cause submitted on one printed case and one brief on each side, all will be treated as one party for the purpose of taxing costs in the supreme court, although each defendant separately appealed. *Milwaukee S. T. & D. Co. v. American Cent. Ins. Co.* 298

COUNTIES.

Bridges. See HIGHWAYS AND BRIDGES, 1–10.

Bounties: Refund to town. See OFFICERS, 3.

Claims: Verification.

Where a claim filed with the county board without verification was disallowed for that reason, such disallowance did not bar a subsequent presentation of the same claim, duly verified, and its allowance by the board. *Blaser v. Vanden Heuvel,* 98

COUNTY BOARD. See MANDAMUS, 2, 3.

COUNTY CLERK. See MANDAMUS, 2.

COUNTY COURTS. See COURTS, 5–9. WILLS, 1, 2.

COURTS.

Judges: Removal: Shortening term. See JUDGES.

Jurisdiction, in general: Public policy.

1. The courts, in passing upon the validity of a law, have nothing to do with mere questions of public policy, so long as the law is within the field of legislative power and discretion. *Milwaukee v. Raulf,* 172

Enforcing judgments of courts of other states. See DIVORCE, 5–7.

Supreme court: Original jurisdiction: When exercised.

2. An action to determine whose name should, after a primary election, be certified by the secretary of state as the nominee of a party for a state office—in this case that of member of assembly—is within the original jurisdiction of the supreme court; but, in view of the statutory provisions for a recount of the votes, and because there would be an issue of fact which must be sent to the circuit court for trial, with no reasonable certainty that any result could be reached before the time when the secretary of state must act, leave to bring such an action is in this case denied. *Petition of Anderson,* 1

3. A proceeding by writ of *certiorari* to review the action of the commissioners of public lands in refusing their consent to an order made by the state superintendent transferring to another district 120 acres of land owned by the relator and included in a school district which is indebted to the state trust funds, does not involve any material interest of the people at large, and the supreme court therefore declines to exercise its original jurisdiction therein. *State ex rel. Conway v. Donald,* 468

[4. Whether *certiorari* is the proper remedy, and whether in this case the commissioners abused their discretion, not decided.] *Ibid.*

Circuit courts: Jurisdiction: Void order changing place of trial.

5. An order of a circuit court, based on an affidavit of prejudice of the judge, changing the place of trial of an action to a county court which had no jurisdiction thereof, was a nullity, and jurisdiction remained in the circuit court. *State ex rel. Owen v. Reisen,* 123

Same: Certifying proceedings to county court. See COURTS, 9.

Milwaukee civil court. See APPEAL, 24–26.

County courts: Jurisdiction. See WILLS, 1, 2.

6. Ch. 339, Laws 1915, conferring upon the county court of Iowa county the jurisdiction therein specified, did not give that court jurisdiction of an action under sec. 3180*a*, Stats., to abate a public nuisance. *Winchell v. Waukesha,* 110 Wis. 101, distinguished. *State ex rel. Owen v. Reisen,* 123

7. The words "claims, demands and sums" in sec. 1, ch. 339, Laws 1915, relate to claims arising on contract. *Ibid.*

8. Where, after a judgment had become a lien on the interest of the debtor in real estate as heir of his mother, the debtor and other heirs perpetrated a fraud upon the judgment creditor and upon the county court by procuring to be probated a forged will by which the debtor was given no part of said real estate, proceedings for relief against such fraud should be had primarily in the county court, and the creditor as purchaser at the execu-

tion sale under his judgment stood in the debtor's shoes sufficiently to be heard in the probate proceedings. *Komorowski v. Jackowski,* 254

9. Although the creditor brought his action in the circuit court to obtain such relief, he need not commence proceedings over again, since the circuit court, under sec. 2836*b*, Stats., may certify the proceedings to the county court. *Ibid.*

Justices' courts: Jurisdiction.

10. Ch. 423, Laws 1911,—providing that justices of the peace shall not, in counties containing a city of the first class, have jurisdiction of garnishment, replevin, or attachment actions or of bastardy proceedings, nor, in cities of the first class, of actions for forcible entry and detainer,—was within the power of the legislature, under sec. 15, art. VII, Const. of Wis., and does not contravene either sec. 9, art. I, Const. of Wis., or amendm. XIV, Const. of U. S. *State ex rel. Wixon v. Cleveland,* . 189

CREDITORS' ACTION.

1. The return of an execution unsatisfied is the prime essential of a creditors' action. *Komorowski v. Jackowski,* 254

2. Where a judgment creditor purchased at an execution sale, for the full amount of his judgment, the interest of the debtor in real estate, and obtained the sheriff's certificate, this was in effect a satisfaction of the judgment. *Ibid.*

CRIMINAL LAW AND PRACTICE.

See INDICTMENT AND INFORMATION. MUNICIPAL CORPORATIONS, 7. PARENT AND CHILD. RECEIVING STOLEN GOODS. WEIGHTS AND MEASURES.

Judgment in criminal action: Effect on civil proceeding. See JUDGMENT, 3. PHYSICIANS AND SURGEONS.

The doctrine of former jeopardy applies only as to criminal proceedings. *State v. Lewis,* 363

CUSTOMS AND USAGES. See CARRIERS, 3. INSURANCE, 7. MASTER AND SERVANT, 2. NEGLIGENCE, 1.

DAMAGES.

Measure of damages. See CONTRACTS, 16. FRAUD, 3–5.

1. Damages for the death of a person should be limited to the measure of pecuniary benefits which the surviving relative could reasonably have expected to realize from a continuation of the life of the deceased. *Engel v. T. L. Smith Co.* 515

Excessive damages.

2. Although, upon the record before it on a former appeal, this court was of the opinion that an award exceeding $12,000 for plaintiff's injuries should not be sustained, yet, upon the evidence adduced at the second trial, showing more clearly the permanency of his disability and also the extent and intensity of his suffering and the certainty of its continuance through life, an award of $15,000 (reduced by the trial court from $17,300) is upheld. *Adams v. Bucyrus Co.* 146

3. For the death of an unmarried son, thirty years old, who earned $1.50 per day and gave all but enough to cover his reasonable necessities to support the family, an award of $4,800 to his wid-

owed mother, aged fifty-three, who was in good health and earning money and who had four other sons, ranging in age from five to eighteen, contributing to the family support, is *held* excessive, and plaintiff is given an option to take judgment for $3,500 or submit to a new trial. *Engel v. T. L. Smith Co.* 515

Offsetting damages. See COSTS, 3.

DAMS. See MILLS AND MILLDAMS. NAVIGABLE WATERS.

DEATH. See DAMAGES, 1–3. ELECTRICITY. NEGLIGENCE, 1, 6. WILLS, 6–10. WORKMEN'S COMPENSATION, 1.

DEBTOR AND CREDITOR. See COURTS, 8, 9. CREDITORS' ACTION. FRAUDULENT CONVEYANCES. HOMESTEADS. PRINCIPAL AND SURETY.

DECEIT. See FRAUD.

DEDICATION. See PLATTING LANDS, 2, 3.

DEEDS.

Construction: Conditions: Future support of grantors: Payments to others.

1. A farm was conveyed to the grantors' son-in-law upon certain "terms and conditions" relating to the support, maintenance, and payment of indebtedness of the grantors, and providing "that in case of the payment of $1,000 indebtedness by [the grantee] at the end of ten years he shall pay to the three children of [the grantors] $300 in annual payments of $1,000 each." A few days afterwards said grantors by a lease gave to the son-in-law the use of about $1,000 worth of personal property during their lives upon condition that he remain upon the farm and in all things perform the contract contained in the deed thereof to him, and in case he so remained during their lives and fully performed said contract the title to the personalty was to vest absolutely in him. *Held*, that the obligations so assumed by the son-in-law were personal on his part and could not be passed on to a vendee, and that any shifting of the responsibility would be a breach of the condition of the conveyance. *Krahn v. Goodrich*, 600
2. The purpose of the whole transaction was that the entire property, real and personal, should be kept intact for the protection of the grantors so long as they, or either of them, should live; otherwise that the property should revert to them. *Ibid.*
3. The condition precedent, performance of which was essential to give vitality to the provision, in the deed of the farm, for the three children of the grantors, was the payment of $1,000 of the grantors' debts by the son-in-law personally—not by any one else or by using the property therefor. *Ibid.*
4. The word "pay" as used in the deed was intended to have its ordinary meaning, which is to discharge an indebtedness by the use of money. It meant an actual extinguishment of indebtedness, relieving the property from the incumbrance thereof, not a mere change in form or of creditors, leaving the property burdened as before, nor a discharge of the indebtedness by using the property therefor. The condition precedent in this case was, therefore, not satisfied by the son-in-law taking up an old mortgage indebtedness and giving a new mortgage on the land, nor by his transfer of the land to his mother-in-law and her transfer to another person. *Ibid.*

5. The conveyance of land by deed on condition that the grantee pay to a third person a specified sum of money, and acceptance of such conveyance, create a lien upon the land in favor of such third person; but where the payment is made contingent upon a condition precedent, the lien is likewise contingent, and if the time limited for such precedent event to occur expires without its happening the possibility of the lien ripening into an absolute interest no longer exists. *Ibid.*

6. The contingent provision in the deed that the grantee should pay "to the three children of [the grantors] $300 in annual payments of $1,000 each" never having become operative, it is unnecessary to determine whether that provision is void for uncertainty, or whether the trial court correctly construed it as meaning that $100 was to be paid to each of said children on April 19, 1907, and the same amount annually thereafter until each should receive $1,000. *Ibid.*

7. Other questions also as to whether the rights of the three children had been extinguished by the statute of limitations, or had become unenforceable through laches, and as to whether one to whom the farm had been conveyed should have a lien thereon for the value of improvements made by him superior to any claim of the children, are not decided. *Ibid.*

When grantor to pay taxes: Quitclaim. See TAXATION, 6.

Trust deeds. See INSURANCE, 12. PUBLIC UTILITIES, 4, 6–11. TRUSTS, 1–5.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See ABATEMENT AND REVIVAL. DEEDS, 7. MORTGAGES, 5. PUBLIC UTILITIES, 11. TAXATION, 5.

DELEGATION OF LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 3. HIGHWAYS AND BRIDGES, 6, 7, 10. NAVIGABLE WATERS, 4.

DELIVERY.
Of note. See BILLS AND NOTES, 1–4.
Of bill of lading. See CARRIERS, 1–4.
Of policy. See INSURANCE, 3–8.
Of goods. See CARRIERS, 1–4. SALES, 5.

DEMURRAGE. See CARRIERS, 1, 2.

DEPENDENCY on deceased employee. See WORKMEN'S COMPENSATION, 1.

DESCENT AND DISTRIBUTION. See EXECUTORS, 3–5. WILLS, 6–10.

DISCHARGE.
Of employee. See MASTER AND SERVANT, 3–6.
Of surety. See PRINCIPAL AND SURETY, 3–8.

DISCRETION.
Legislative. See COURTS, 1. HIGHWAYS AND BRIDGES, 8, 10.
Judicial. See ABATEMENT AND REVIVAL. DISMISSAL AND NONSUIT. MASTER AND SERVANT, 5. PARTIES.

DISMISSAL AND NONSUIT.

See APPEAL, 23. MILLS AND MILLDAMS, 4. NEGLIGENCE, 5.

Dismissal for failure to bring to trial: Discretion.

1. Sec. 2811*a*, Stats., does not absolutely bar proceedings in actions not brought to trial within five years, but is permissive and is to be enforced within the sound discretion of the court. *Pereles v. Christensen,* 163

Dismissal by stipulation: Bar to subsequent action: Agreement by attorney.

2. A stipulation to dismiss an action without costs is not a bar to a subsequent action for the same cause. *Seymour State Bank v. Rettler,* 619

3. An agreement by an attorney to dismiss an action upon its merits is invalid in the absence of evidence that he had special authority so to do. *Ibid.*

[4. Whether, where a former action for the same cause was dismissed by stipulation, parol testimony is admissible to show an agreement between the attorneys for the respective parties—pursuant to which the stipulation was filed—that plaintiff would waive his cause of action, is not decided.] *Ibid.*

DISORDERLY HOUSE. See NUISANCES.

DISSOLUTION of partnership. See PARTNERSHIP.

DIVIDENDS: Rescission. See CORPORATIONS, 10, 11.

DIVISION OF PROPERTY. See DIVORCE.

DIVORCE.

Division of property: Wife's estate derived from husband: Alimony: Adultery of wife.

1. Under sec. 2342, Stats., a wife may take title to property from her husband and hold it as her sole and separate estate; and under sec. 2372, no judgment of divorce can affect her right to such estate, nor can the court in such action divest her title thereto, except upon a division of property between the parties as provided in sec. 2364. *Pfingsten v. Pfingsten,* 308

2. Under sec. 2364, Stats., alimony cannot be allowed to a divorced wife where the divorce is granted on the ground of adultery committed by her, but the division and distribution of property therein provided for may be made even though the divorce be granted for said cause. *Ibid.*

3. In combining secs. 24 and 29, ch. 111, R. S. 1858, in sec. 2364, R. S. 1878, there was no intention to lessen the powers of the court in respect to property matters, or to preclude a division and distribution of estate as therein provided even when the divorce was granted for adultery of the wife. *Ibid.*

4. In view of the history of the statute and the unreasonableness or absurdity of a contrary construction, it is *held* that the words "excepting that of adultery committed by the wife" in sec. 2364, Stats., do not reach forward and condition the clause commencing "or the court may finally divide," and that in said clause, between the words "the court" and the words "may finally divide," the words "in any case where alimony is not adjudged" may be read as in place by reasonable inference. *Ibid.*

Judgment in another state: Property rights: Enforcement in this state.

5. A judgment of an Illinois court having jurisdiction of the subject matter of a divorce action and of the parties, both of whom were domiciled in that state, granting a divorce to the plaintiff wife, awarding alimony to her, "to be satisfied by the defendant by conveying to" her certain real estate in Wisconsin which he owned when the action was commenced, and directing that in

default thereof execution issue therefor, is entitled, under sec. 1, art. IV, Const. of U. S., to full faith and credit in Wisconsin. *Mallette v. Scheerer,* 415

6. Where in such a case the defendant husband, by evading the processes of the Illinois court, prevented that court from enforcing its judgment and compelling him to convey the Wisconsin land to the plaintiff, and had fraudulently conveyed it, while the divorce action was pending, to other persons, the wife is entitled to relief in the Wisconsin courts by way of a judgment enforcing the obligations of the Illinois judgment and, as incidental thereto, setting aside the fraudulent conveyances and quieting the title in her. *Ibid.*

7. No objection to the enforcement of such a divorce judgment in the courts of Wisconsin exists on the ground of conflict between the policy of this state and that of Illinois in respect to the power of the courts in such cases to determine and enforce a division and distribution of the husband's estate,—the policies of the two states being in accord on that subject. *Ibid.*

EASEMENT: Prescription. See NAVIGABLE WATERS, 7–9.

EIGHT-HOUR DAY. See CONSTITUTIONAL LAW, 1–3. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 4–10.

EJECTMENT.

See EVIDENCE, 6.

In an action of ejectment the location of the premises and their situation with reference to the property involved in a previous action of ejectment by the same plaintiff are *held* to have been sufficiently shown by the evidence and the statements made to the trial court by counsel for both parties. *Illinois Steel Co. v. Muza,* 247

ELECTION.

To submit to judgment, etc. See APPEAL, 3.

To pay cash, rather than in notes. See PRINCIPAL AND SURETY, 6.

Between remedies. See PUBLIC UTILITIES, 10. TRUSTS AND TRUSTEES, 8.

ELECTIONS.

Regulation: Validity of statutes.

1. The statutes regulating elections, and especially the provisions relating to official ballots, are assumed to be reasonable and constitutional. *State ex rel. Kleist v. Donald,* 545

Validity: Failure to give notice, etc.

2. Where there is in fact an election at the time and place designated by law, such election is valid although the statutory notice was not given. *State ex rel. Kleist v. Donald,* 545

3. Where the failure to comply with the law results in a few only out of a large number of electors exercising the right to vote at the time and place designated by law, there is no election. *Ibid.*

4. The proper officers, acting in good faith in accordance with a void statute, refused to give notice of an election and there was no compliance in any respect with the laws relating to official ballots and their use. The relator, without seeking judicial relief to compel said officers to perform their duty, gave extensive

notice through various publications that he was a candidate and solicited votes at an election to be held at the time fixed by law. The electors generally believed that no election was to be held, and comparatively few voted, casting their ballots for the relator, there being no other candidate. *Held*, that there was no election. *State ex rel. Peacock v. Orvis*, 20 Wis. 235, and other cases, distinguished. *Ibid.*

Same: Ineligibility of person elected. See OFFICERS, 1.

Qualifications of voters: University students: Residence.

5. Attendance at an institution of learning for the sole purpose of acquiring an education is not of itself sufficient to establish the student's residence at that place so as to entitle him to vote there. *Seibold v. Wahl*, 82

6. In such a case much weight is to be given to the fact as to whether or not the student is emancipated from his family in the matter of looking to them for a home or a place to which to return or for means of support. *Ibid.*

7. A student who registered at the state university from another place in the state, where his parents reside and to which place he returns in his vacations, and who is dependent, in part at least, upon that home for his support, was not entitled to vote in Madison, his attendance at the university being for a "temporary purpose merely," within the meaning of sub. 3, sec. 6.51, Stats. 1915, and his removal to Madison being "without intention to acquire a new residence," within the meaning of sub. 9 of that section. *Ibid.*

8. While attendance at an educational institution for the sole purpose of getting an education is for a "temporary purpose," within the meaning of sub. 4, sec. 6.51, Stats. 1915, other elements may be added which develop such purpose into one of making a home at that place. *Asbahr v. Wahl*, 89

9. Thus, an entirely self-supporting student who came to Madison from a distant state, where his parents reside, but who had been emancipated from them and had earned his own living and voted elsewhere than at their home, might, even though he came for the sole purpose of attending the state university, have the intention to acquire a new residence in Madison, within the meaning of sub. 9, sec. 6.51, Stats. 1915; and in such case, having registered from Madison and fixed his habitation there, with no present intention of removing therefrom and an intention, whenever he is absent, of returning thereto, he is entitled to vote in Madison. *Ibid.*

10. A student who came to Madison to attend the law school of the state university, registering from another place in the state, where his parents reside and where he spent his last vacation, but who had taught school for several years in another city in the state and had voted there, and whose expenses are paid partly from his own money and partly from money borrowed from his father which he is under obligation to repay, is *held* entitled to vote in Madison. *Gross v. Wahl*, 91

11. Giving his complaint a liberal construction, the attendance of such student at a law school in Chicago for a part of a year did not break the continuity of his residence in this state. *Ibid.*

12. A student who came to Madison solely to attend the state university, registering from a foreign state, where his parents reside and where he spends a part of his vacations, and whose expenses

are partially paid by his father, is not a resident of Madison, within the meaning of sec. 6.51, Stats. 1915, and hence not entitled to vote there. *Wadsworth v. Wahl,* 93

Nominations: Primary election: Certification of nominee. See COURTS, 2.

Contests: Evidence: Incomplete recount: Ballots: Tally sheets.

13. A partial recount of ballots under sec. 86, Stats. 1913 (sec. 6.66, Stats. 1915), which was stopped by an order of court before it was completed, was not competent evidence, in a subsequent action of *quo warranto,* to impeach the determination of the board of county canvassers that the defendant was duly elected to a county office. *State ex rel. Plehn v. Widule,* 3

14. Where a statute (sec. 80, Stats. 1913; sec. 6.60, Stats. 1915) providing for the preservation and protection of ballots to be used in a contest has not been complied with, or where it appears that the integrity of the ballots has not been preserved, such ballots are not competent evidence to impeach the determination of the board of canvassers. *Ibid.*

[15. Whether the tally sheets kept by the precinct election officers and returned to the county clerk pursuant to secs. 42*a*, 78, Stats. 1913 (secs. 6.28, 6.59, Stats. 1915), are competent evidence to impeach the determination of the board of canvassers, is not decided.] *Ibid.*

Certificate of election: Compelling issuance. See MANDAMUS, 1.

ELECTORS: Qualifications. See ELECTIONS, 5–12.

ELECTRICITY.

Hydroelectric plant is "water mill." See MILLS AND MILLDAMS, 2, 3.

Construction of lines: Negligence: Wires above bridge.

1. The side trusses of an iron highway bridge rose to the height of sixteen feet above the floor and were fastened together at the top by cross-beams and braces, so that nothing over sixteen feet high could pass over the bridge. High tension electric wires of the defendant light and power company crossed diagonally above said bridge near one end, one of such wires being attached to a pole on each side of the bridge at a height of twenty-nine feet three inches above the ground, and being at the point in question six feet two inches above the top of the bridge and thirty-two feet above the ground beneath the bridge. Plaintiff's son, eighteen years old and nearly six feet tall, climbed to the top of one of the trusses and in some way came in contact with, or within two inches of, said wire and was killed. Upon evidence showing the above, among other facts, it is *held,* as matter of law, that defendant was not negligent in so constructing its lines, and that the deceased was guilty of contributory negligence. *Vannatta v. Lancaster Light & P. Co.* 344

2. Sub. 2, sec. 1329*a*, Stats. 1915,— providing that all such wires shall not be less than twenty-four feet above the ground at all crossings and not less than fourteen feet above the ground at all other places,—did not apply to the defendant in the construction of its line over the bridge in question. *Ibid.*

EMANCIPATION. See ELECTIONS, 6.

EMINENT DOMAIN. See HIGHWAYS AND BRIDGES, 4. MILLS AND MILLDAMS. PUBLIC UTILITIES.

EMPLOYERS' LIABILITY. See INSURANCE, 14–16. JUDGMENT, 2. MASTER AND SERVANT, 8–19. WORKMEN'S COMPENSATION.

ENCROACHMENTS. See HIGHWAYS, 12–15.

EQUAL PROTECTION OF THE LAWS. See COURTS, 10.

EQUALIZATION. See TAXATION, 1–5.

EQUITABLE CONVERSION. See TRUSTS AND TRUSTEES, 2.

EQUITY. See ADOPTION. COURTS, 6–9. CREDITORS' ACTION. DIVORCE. ESTOPPEL. MECHANICS' LIENS, 7–10. MORTGAGES. NUISANCES. PRINCIPAL AND SURETY. REFORMATION OF INSTRUMENTS. TRUSTS AND TRUSTEES.

ESTATES.
In land. See WILLS, 5–8.
Of decedents. See EXECUTORS AND ADMINISTRATORS. HOMESTEAD. HUSBAND AND WIFE, 4–7. JUDGMENT, 6. WILLS.

ESTOPPEL.

See CONTRACTS, 10. EXECUTORS, 4. HUSBAND AND WIFE, 7. JUDGMENT, 1, 2. MECHANICS' LIENS, 9. MUNICIPAL CORPORATIONS, 11. PLATTING LANDS, 4. PUBLIC UTILITIES, 11. REFORMATION OF INSTRUMENTS, 2.

1. If a person, in a business transaction, makes representations or assumes a position for the purpose of inducing another to act in reliance thereon, knowing or having reasonable ground to know that he will do so, and such is the result, so that in case of such person being permitted to act contrary to such representations, or to take a position inconsistent with that relied on, damage would result to such other, such person will be barred from having any benefit of such contrary action or inconsistent position to such other's loss. *Milwaukee S. S. Co. v. Borun,* 502
2. One cannot deny a representation which he has made, when by such denial injury would result to another who, having the right to do so, has relied on the representation and based his own conduct thereon. *Schoenwetter v. Schoenwetter,* 131

EVIDENCE.

Presumptions. See HIGHWAYS, 15. INSURANCE, 3.

1. There is no presumption that every person knows the law as a fact. A better statement of the rule is that ignorance of the law affords no excuse for its violation. *State ex rel. Kleist v. Donald,* 545

Burden of proof. See BILLS AND NOTES, 6. INFANTS, 2. NAVIGABLE WATERS, 5. PRINCIPAL AND SURETY, 4.

Relevancy, materiality, and competency. See ACCORD AND SATISFACTION, 3. APPEAL, 19–22. ELECTIONS, 13–15. INSURANCE, 2, 7. MASTER AND SERVANT, 11. NEGLIGENCE, 9. PARENT AND CHILD, 5. STREET RAILWAYS, 4. TAXATION, 4.

2. Where an accident policy was sent to the assured by mail but remained in the delivery office for some weeks, during which time the assured was accidentally killed, evidence as to what the assured had said to members of his family and to the clerk at the postoffice in respect to the policy, during the period of delay, was competent, as part of the *res gestæ*, upon the questions whether he intended to accept the policy and whether his delay was for

the purpose of postponing payment of the premium. *Hartwig v. Ætna L. Ins. Co.* 20

3. A certificate of baptism is not competent evidence of the date of birth of the person baptised. *Lambrecht v. Holsaple,* 465

Parol evidence affecting writings. See DISMISSAL AND NONSUIT, 4. SALES, 4.

Opinion evidence.

4. The fact that the doctor who attended plaintiff had stated that while the injury to plaintiff's eye might become permanent, he could not say it would be so, did not preclude him from giving his opinion that the injury would become chronic. *Scheuer v. Manitowoc & N. T. Co.* 333

Evidence at former trial or in other proceeding: Deceased or absent witnesses.

5. The "other action or proceeding," in which, under sec. 4141*a*, Stats., the testimony of a deceased witness or a witness who is absent from the state is admissible, is not limited to actions or proceedings in which the parties are the same as in the action wherein the testimony was originally taken, it being sufficient that the party against whom such testimony is offered had a full and adequate opportunity to cross-examine the witness on substantially the same issue and then had the same interest and motive to cross-examine that he has on the pending trial. *Pfeiffer v. Chicago & M. E. R. Co.* 163 Wis. 317, so far as it conflicts herewith, overruled. *Illinois Steel Co. v. Muza,* 247

6. So *held* in an action of ejectment as to testimony of a witness, since deceased, which had been taken in a previous action of ejectment by the same plaintiff against another defendant,—such witness, who was the predecessor of both defendants in the occupancy of a tract which included the separate parcels involved in the two actions, having testified as to his adverse possession of the whole of such tract. *Ibid.*

7. The testimony of a witness taken on a trial in justice's court was admissible, under sec. 4141*a*, Stats., upon the trial of the case on appeal to the circuit court, if at the time of the latter trial he was out of the state. *Lambrecht v. Holsaple,* 465

8. The question in such case whether the witness was out of the state or not was one of fact for the circuit court to decide, and its decision thereof will not be disturbed on appeal unless clearly wrong. *Ibid.*

Weight and sufficiency. See CARRIERS, 9, 10. HIGHWAYS, 12. HUSBAND AND WIFE, 2–4, 6. INSURANCE, 4–7. MASTER AND SERVANT, 12, 18, 19. PARENT AND CHILD, 1. REFORMATION OF INSTRUMENTS. SALES, 5. WORKMEN'S COMPENSATION, 1.

Same: Positive and negative testimony. See RAILROADS, 6.

EXCEPTIONS. See APPEAL, 5.

EXCESSIVE DAMAGES. See DAMAGES, 2, 3.

EXECUTION.

See COURTS, 8, 9. CREDITORS' ACTION. FRAUDULENT CONVEYANCES, 1, 2. HOMESTEAD. JUDGMENT, 5, 6. MORTGAGES, 4. NEGLIGENCE, 7.

Where a recovery is had against two defendants for injuries found to have been caused by negligence of both, the plaintiff may satisfy his claim out of either. *Ertel v. Milwaukee E. R. & L. Co.* 380

EXECUTORS AND ADMINISTRATORS.

Appointment: Administrator de bonis non: Appeal.

1. It appearing, after the discharge of the executor of a will admitted to probate in this state, that there was personal estate of the deceased which had not been administered upon, the county court properly appointed an administrator *de bonis non*, and, no objection being made to his fitness, an appeal from the order appointing him could result only in an affirmance; hence the dismissal of an appeal therefrom by an administrator *de bonis non* previously appointed in another state was, if error, not prejudicial. *Will of Durkee*, 41

Same: Foreign administrator: Right of appeal.

[2. Whether the word "administrator" in sec. 4031, Stats.,—authorizing an appeal from any order of the county court,—includes an administrator appointed under the laws of another state, not decided.] *Will of Durkee*, 41

Title to personal property.

3. Although the title to personal property of a decedent goes to the executor or administrator, the legal heirs or legatees possess the equitable title subject only to the expenses of administration and the payment of debts. *Schoenwetter v. Schoenwetter*, 131

Same: Distribution without probate proceedings: Trustee: Consideration for note.

4. Where, without probate proceedings but pursuant to an agreement in writing among all persons (except possible creditors) interested in the estate of a decedent, one of the heirs, who had possession of the property, executed a note for the value thereof, signed also by an accommodation maker, to a trustee who was to collect the same and divide the money among the heirs, and said heir retained the property to his own use until the note became due four years later, both makers of the note are estopped to assert that it was not valid or was without consideration. *Schoenwetter v. Schoenwetter*, 131

5. No judgment on such note in favor of the trustee could affect the rights of an administrator or executor if one should thereafter be appointed; and before distributing the proceeds of such judgment the trustee should ascertain whether there was a will and, if so, cause it to be probated. *Ibid.*

Completing contract of decedent: Assumption of mortgage: Personal liability.

6. The formal completion by an administrator, under authority of the county court, of a contract made by the intestate, under which land was to be conveyed to him and he was to assume a mortgage thereon, created no personal liability on the part of the administrator for the mortgage debt, nor preferred liability against the estate, but simply a liability on an equal footing with other debts contracted by the deceased. *Clarke v. Johnson*, 461

7. The judgment rendered on foreclosure of such mortgage is construed to be in accordance with the rights and liabilities of the parties as above stated, although some provisions therein seem not to be in harmony with that construction. *Ibid.*

Claims against decedent's estate. See HOMESTEAD. HUSBAND AND WIFE, 4–7. JUDGMENT, 6.

Same: Execution. See JUDGMENT, 6.

EXEMPTIONS. See FRAUDULENT CONVEYANCES, 1, 2. HOMESTEAD. JUDGMENT, 6.

EXHIBITS. See PLEADING, 1.

EXPERT TESTIMONY. See EVIDENCE, 4.

FALSE REPRESENTATIONS. See CORPORATIONS, 4. FRAUD.

FEDERAL AND STATE STATUTES. See MASTER AND SERVANT, 17.

FELLOW-SERVANTS. See MASTER AND SERVANT, 18, 19.

FENCES. See HIGHWAYS, 12–15.

FINDINGS OF FACT. See APPEAL, 9–17, 26.

FIRE PATROL: Right of way over streets. See MUNICIPAL CORPORATIONS, 1–3.

FIXTURES. See INSURANCE, 12.

FLOWAGE OF LANDS. See MILLS AND MILLDAMS. NAVIGABLE WATERS.

FORECLOSURE. See EXECUTORS, 7. MECHANICS' LIENS, 7–10. MORTGAGES, 2–6. PUBLIC UTILITIES, 11.

FOREIGN ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS, 1, 2.

FOREIGN CORPORATIONS. See CORPORATIONS, 8, 9.

FOREIGN JUDGMENTS. See DIVORCE, 5–7.

FORMER JEOPARDY. See CRIMINAL LAW.

FRAUD.

See ACTION. CORPORATIONS, 4. FRAUDULENT CONVEYANCES.

False representations: Materiality: Fact or opinion?

1. False representations as to the cost of a contract granting the right to sell certain articles and as to the profits which had been made in the business, made by defendant to induce plaintiffs to buy such contract from him, were material representations of fact and actionable. *Winnek v. Moore,* 53

Same: Pleading: Damages.

2. A complaint alleged that plaintiff placed the sale of real estate with certain brokers; that defendant R. brought the other defendant, M., to plaintiff to purchase the property, and they falsely represented that M. alone was interested in the purchase, that none of said brokers had presented the matter of a purchase to them, and that R. was the only person who, as a real-estate agent, had presented the matter to M.; that plaintiff, relying on such representations, sold and conveyed the property to M. and paid R. a commission of $1,200 for making the sale; that in fact said R. and M. were jointly interested in the purchase and shared the commission, and the truth was that certain of said brokers had previously negotiated with M. to sell him the property; that after the sale to M. plaintiff was sued for commissions by two of such brokers; that defendants, R. and M., refused a tender of the defense of such actions, and were witnesses therein; that in those actions the brokers recovered judgments against plaintiff, which were satisfied by plaintiff; and that plaintiff incurred large expense in defending those actions. Plaintiff sought to recover from R. and M., as a first cause of action, the amounts paid to satisfy said judgments and the expenses incurred; and, as a second cause of

action, the $1,200 paid to R. as a commission. *Held*, on demurrers, that the facts stated constituted a single cause of action for false representations, with several items of damage. *Sterling E. & C. Co. v. Miller*, 192

3. The expenses incurred in connection with the defense of the actions brought by the brokers were recoverable, such defense having been warranted by the representations made to plaintiff by R. and M. *Ibid.*

4. But the amounts paid to satisfy the judgments in those actions are not recoverable, because it must be assumed that the brokers established therein their rights to commissions, and the representations made by the defendants herein could not have altered those rights. *Ibid.*

5. The amount of the commission paid to defendant R. is recoverable, because R., being jointly interested in the purchase, without knowledge of the plaintiff, was not lawfully entitled to any commission. *Ibid.*

FRAUDULENT CONVEYANCES.

See DIVORCE, 6, 7.

Purchase of homestead with nonexempt property: Fraudulent intent: Notice.

1. A debtor may, in good faith, purchase a homestead with nonexempt money or property. *Leutermann v. Aschermann*, 162

2. Even if such a purchase be made with the intention of defeating creditors, the transaction cannot, under sec. 2324, Stats., be set aside unless it be shown that the other party thereto had notice of or participated in such fraudulent intent. *Ibid.*

Sale of stock of goods in bulk: Statute: Validity.

3. The bulk sale law (secs. 2317*c* to 2317*f*, Stats.),—providing that, with certain exceptions, the sale of a stock of goods in bulk, otherwise than in the ordinary course of trade, shall be conclusively presumed to be fraudulent and void as against existing creditors of the seller, unless certain requirements for the information and protection of such creditors are complied with,—is a valid exercise of the police power and does not invade any constitutional guaranty. *Gazett v. Iola Co-operative M. Co.* 406

4. A sale in bulk of a stock of goods without compliance with secs. 2317*c* to 2317*f*, Stats., being void, the buyer at such sale holds the goods or the proceeds thereof subject to be reached by garnishment. *Ibid.*

5. Where, after such a sale by insolvents, they settled with many of their creditors for fifty cents on the dollar, and in an action by a creditor with whom no settlement was made it appeared that the buyer was chargeable as garnishee with an amount largely in excess of the total amount of claims unsatisfied, the plaintiff was entitled to have his claim paid in full. *Ibid.*

[6. Whether under any circumstances there should be a *pro rata* distribution among the creditors of the amount with which the buyer at such a sale is chargeable, not decided.] *Ibid.*

FRAUDULENT REPRESENTATIONS. See FRAUD.

FREIGHT. See CARRIERS, 1–6.

GARNISHMENT. See FRAUDULENT CONVEYANCES, 4–6.

GROSS NEGLIGENCE. See RAILROADS, 8.
HARMLESS ERRORS. See APPEAL, 18–22.
HIGHWAY COMMISSION. See HIGHWAYS AND BRIDGES, 6, 7.
HIGHWAY CROSSINGS: Collisions. See RAILROADS, 5–11.

HIGHWAYS AND BRIDGES.

Dedication of streets, etc. See PLATTING LANDS, 2, 3.

Bridges over navigable streams: Construction by municipalities: Consent of war department: Apportionment of cost.

1. The provisions of sec. 1321*a*, Stats. 1915 (relating to the construction of bridges over navigable streams), were enacted as part of the general policy to establish an efficient state highway system, and must be interpreted in the light of such legislative purpose. *State ex rel. Owen v. Stevenson*, 569
2. Under sec. 1321*a*, Stats., as amended by ch. 418, Laws 1915, it is not essential that permission or approval of the war department of the United States be obtained before the taking of the required steps to provide for the construction and the payment of the cost of a bridge over a navigable stream, or before a *mandamus* proceeding can be maintained to compel the proper appropriation therefor by a county board. But the highway commission must obtain such approval of the federal authorities before the construction of the bridge is begun, and should do so at an early stage of the proceeding. *Ibid.*
3. Although a proposed bridge spanning the Wisconsin river between the village of Prairie du Sac, Sauk county, and the town of West Point, Columbia county, would extend over a portion of the river bed lying within the boundaries of Dane county, and a pier thereof would be constructed on an island lying in Dane county, such bridge is one within the calls of sec. 1321*a*, Stats. 1915, is located between the village and town named, and they are together to pay one third of its cost, the counties of Sauk and Columbia each one sixth, and the state one third. No part of such cost is chargeable to Dane county or to the town therein over which the bridge would extend. *Ibid.*

Same: Eminent domain: Powers of highway commission: Taxation.

4. The authority conferred upon municipalities to construct such a bridge necessarily implies that they may exercise the power of eminent domain for the acquisition of whatever land may be necessary for its construction and to connect it properly with the public highways. *State ex rel. Owen v. Stevenson*, 569
5. Sec. 1321*a*, Stats. 1915, is not so indefinite and uncertain as to render it void. *Ibid.*
6. The powers conferred upon the state highway commission by sec. 1321*a*, Stats. 1915, to find the fact as to the public necessity for a bridge at the place in question, to locate the same, to determine the character and kind of bridge adapted to the location, and to estimate the cost thereof, are not legislative powers, but are either purely administrative or *quasi*-executive in character and such as can properly be delegated to such a state agency. *Ibid.*
7. In estimating the cost of such a bridge, which cost is to be paid by the state, the counties, and municipalities in prescribed proportions, the state highway commission does not impose a tax for

the building of the bridge. The municipalities themselves, in voting to build the bridge, impose such tax; and the authority so to do may properly be given to them by the legislature. *Ibid.*

Same: Uniformity in town and county government: Inequalities in taxation.

8. The statute (sec. 1321*a*, Stats. 1915) does not violate sec. 23, art. IV, Const.—providing for "one system of town and county government, which shall be as nearly uniform as practicable,"—in that it authorizes only those cities, villages, and towns "bordering upon or through which any navigable or meandered stream runs" to build bridges, without granting other municipalities this power. Such a classification of municipalities is appropriate and within the legislative power. *State ex rel. Owen v. Stevenson,* 569

9. Nor is the authority conferred upon those municipalities by the statute repugnant to sec. 22, art. IV, Const., providing for the conferring of local legislative and administrative powers on boards of supervisors. *Ibid.*

10. Sec. 1321*a*, Stats. 1915, does not conflict with sec. 1, art. VIII, Const., providing that "the rule of taxation shall be uniform." The policy of the state in exerting the right of taxation for public improvements of this character cannot be limited or controlled by the benefits it may confer. If actual inequalities of tax burdens result from the statute, that is a matter for legislative consideration. *Ibid.*

Same: Compelling appropriations. See MANDAMUS, 2, 3.

Town-line highways: Division: Maintenance of bridge.

11. In an order made under sec. 1273, Stats., by the supervisors of adjoining towns, dividing a town-line highway and assigning certain parts thereof to be maintained by each town, no mention having been made of a small bridge in one of the parts so assigned and no provision made for its joint maintenance, the town to which said part was assigned and which had maintained the bridge for sixteen years at its own expense was bound to replace the bridge after an unusual flood had destroyed it and widened the bed of the stream which it spanned. *Pella v. Larabee,* 403

Rights of public in highways: Estoppel. See MUNICIPAL CORPORATIONS, 11. PLATTING LANDS, 4.

Encroachments: Fences: Removal.

12. A finding by the trial court that defendant was the sole occupant of the land to which fences which encroached upon a highway were appurtenant, is *held* to be sustained by evidence showing, among other things, that although his sister owned a half interest in the property and lived on the premises with him, he was in possession, managing and operating the farm and having control thereof; and service upon the sister of the order requiring removal of such fences, under sec. 1330, Stats., was not necessary. *Mineral Point v. Kealy,* 351

13. An order under sec. 1330, Stats., for the removal of encroaching fences, which accurately described the center line of the highway and its width, the land to which the fences, which were crooked and irregular, were appurtenant, and that portion of the highway upon which they encroached, sufficiently specified the extent of the encroachment. *Ibid.*

14. An order made on September 9th requiring the removal of encroaching fences "within thirty days from the first of October" following, was not contrary to sec. 1337, Stats., which provides that "no person shall be required to remove any fence . . . except between the first day of October and the first day of April." *Ibid.*

15. Sec. 1284, Stats., is not applicable, nor is the notice therein provided for a condition precedent, to proceedings under secs. 1330–1337 for the removal of fences which encroach upon a highway. In case of an ancient highway, if any fences existed at the time it was laid out it must be presumed that the proper notice was given under sec. 1284. *Ibid.*

Injuries from defects: Contributory negligence.

16. A person knowing the defective condition of a highway may nevertheless use it, even after dark, without being guilty of contributory negligence as a matter of law. *Schmidt v. Franklin*, 128

17. Whether a woman who, while traveling over a highway which she knew was defective, was thrown from the seat on top of a high wagon box when the wheels of the wagon suddenly plunged into a hole, was guilty of contributory negligence in using such seat, is *held* to have been a question for the jury, it appearing that the seat was the ordinary one used on wagons of like character. *Ibid.*

18. The whole question of contributory negligence in such case was for the jury, there being conflicting evidence from which different inferences might be drawn. *Ibid.*

Collisions between vehicles: Speed limit, etc. See AUTOMOBILES.

HIRING. See MASTER AND SERVANT, 1–9.

HOMESTEAD.

See FRAUDULENT CONVEYANCES, 1, 2.

1. Under sec. 2280, Stats., where a life estate in the homestead of a testator passes under his will to his widow, with remainder to his children, the remaindermen as well as the life tenant take it free and clear of all judgments and claims against the testator or his estate. *Polzen v. Polzen*, 18

2. But the interest of a daughter, as one of such remaindermen, is liable for any judgment against her, it not being her homestead. *Ibid.*

HOURS OF LABOR: Limiting. See CONSTITUTIONAL LAW, 1–3. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 4–10.

HOUSES OF ILL FAME. See NUISANCES.

HUSBAND AND WIFE.

Duty of husband to support wife: Contract for compensation for his services: Claim against wife's estate.

1. The law requires the husband to support and provide for his wife, and he cannot shirk such requirement even by an express contract with her. *Estate of Simonson*, 590

2. Evidence which would be sufficient to support a finding of a contract between a man and woman for services and compensation before they were married would not necessarily be sufficient

to support a finding that such a contract was made after their marriage. *Ibid.*

3. A wife may lawfully employ her husband as agent or servant in the management of her separate property; but where such contract would necessarily include much which the husband is required by law to do for his wife without compensation there should be, to entitle him to compensation, a very substantial showing of such an agreement. *Ibid.*

4. The evidence in this case is *held* insufficient to support a finding that there was an express contract of employment between husband and wife, before their marriage, sufficiently definite as to the compensation he was to receive so that it can now be enforced by him against her estate. *Ibid.*

5. It appearing that, whatever the agreement as to compensation was, the parties thereto afterwards made a settlement or adjustment of their differences, there can be no finding of an implied contract that the husband was to receive the reasonable value of his services. *Ibid.*

6. The evidence is also *held* insufficient to show the making of a new contract, after marriage, that the services of the husband were to be compensated as if he were still a hired man. *Ibid.*

7. The husband in such case having asserted, before and during the marriage and after the wife's death, the right to possession of certain personal property on the ground that he advanced the money for its purchase, and having, both before and after the wife's death, disposed of some of such property for his own benefit, he cannot recover from the wife's estate the money so advanced. *Ibid.*

Wife's separate estate derived from husband: Divorce: Division of property. See DIVORCE.

IMPAIRING OBLIGATION OF CONTRACTS. See TAXATION, 11.

IMPLIED CONTRACTS. See HUSBAND AND WIFE, 5.

IMPLIED WARRANTY. See SALES, 2–4.

IMPROVEMENTS.
Public. See HIGHWAYS AND BRIDGES.
On land: Lien. See DEEDS, 7.

INCOME TAXATION. See TAXATION, 8–11.

INDEMNITY INSURANCE. See INSURANCE, 14–16. JUDGMENT, 2. MASTER AND SERVANT, 8.

INDEPENDENT CONTRACTORS. See MASTER AND SERVANT, 14–16.

INDETERMINATE PERMIT. See PUBLIC UTILITIES, 1.

INDICTMENT AND INFORMATION.

See RECEIVING STOLEN GOODS.

An information charging a statutory offense need not use the precise language of the statute, if its substance is charged. Thus, an information charging that defendant did "feloniously receive, have, and aid in the concealment of" goods, knowing them to have been stolen, was sufficient under sec. 4417, Stats. 1915. *Huotte v. State.* 354

INDUSTRIAL COMMISSION. See CONSTITUTIONAL LAW, 3. WORKMEN'S COMPENSATION, 1.

INFANTS.

Adoption. See ADOPTION.

Contracts: Purchase of horse: Rescission: Evidence as to age. See EVIDENCE, 3.

1. In an action to recover money alleged to have been paid by plaintiff while a minor for a horse which, when he offered to return it, the defendant refused to take back, the facts that after the case was tried in justice's court plaintiff placed the horse in care of a friend and left the state and that thereafter, the defendant persisting in his refusal to take it back, the horse was sold, do not affect the rights of the parties in the action, such rights having become fixed when the action was commenced. *Lambrecht v. Holsaple,* 465
2. The burden of proving that he was a minor when he bought the horse was upon the plaintiff; and his own testimony to that effect (given on a former trial) being opposed by evidence that he had then been doing business for himself for some time, and of his declarations out of court that he was of age, and his absence at the second trial being unexplained, the question was one for the jury. *Ibid.*

Injuries to unborn infant: Cause of action.

3. No cause of action accrues to an infant for injuries received while *en ventre sa mere* and before it could be born viable. *Lipps v. Milwaukee E. R. & L. Co.* 272

[4. Whether a cause of action for injuries received before birth accrues to an infant capable at the time of injury of being born viable, is not determined.] *Ibid.*

Unlawful employment: Injuries. See JUDGMENT, 2. MASTER AND SERVANT, 8, 9.

INFORMATION. See INDICTMENT AND INFORMATION.

INJUNCTION. See MASTER AND SERVANT, 5. NUISANCES.

INSTRUCTIONS TO JURY.

Province of court and jury. See INSTRUCTIONS TO JURY, 5. STREET RAILWAYS, 6.

1. A trial court may, in charging the jury, call to their attention the evidence produced on both sides, and even speak of the effect of the evidence as given on one side, and the effect of that given on the other, when such effect is clear, leaving it for the jury to determine where the truth lies; and in so doing there is no infraction of the rule that the court should not suggest what is established as to any controverted matter. *Milwaukee S. T. & D. Co. v. American Cent. Ins. Co.* 298

Construction of charge: Proofs of loss not evidence of loss.

2. In an action upon insurance policies the charge to the jury is *held* not to have carried the idea that the proofs of loss were evidence of loss or damage. *Milwaukee S. T. & D. Co. v. American Cent. Ins. Co.* 298

Requested instructions: Inclusion in general charge.

3. It is not error to refuse to give requested, proper instructions if the same, in letter or substance, are given in the general charge. *Scheuer v. Manitowoc & N. T. Co.* 333
4. Same point. *Adams v. Bucyrus Co.* 146

Same: Informing jury as to effect of answers.

5. A requested instruction upon the ultimate question of liability, which informs the jury as to the effect their answer to a question in the special verdict will have upon the final result, should not be given. *Christl v. Hauert,* 624

Harmless misquotation of question.

6. Where, in charging the jury as to the burden of proof upon the question whether defendant was guilty of negligence, the trial court misquoted the question by inserting the word "contributory" before the word "negligence," the error is *held* harmless. *Christl v. Hauert,* 624

Immaterial instructions: Harmless errors. See APPEAL, 18.

Curing error as to argument of counsel. See NEGLIGENCE, 10.

As to negligence, etc. See STREET RAILWAYS, 6.

INSURANCE.

When contract is made: Delivery and acceptance of policy: Giving credit for premiums. See EVIDENCE, 2.

1. If an application for an insurance policy is accepted and the policy is, either by the company directly or through its agent, deposited in the postoffice addressed to the applicant, who is thereafter to pay the premium therefor, and nothing to the contrary is expressed in the policy, the minds of the parties are presumed to have met and a binding contract of insurance is thereby made. *Hartwig v. Ætna L. Ins. Co.* 20

2. That credit for the first premium was extended to the assured may be shown by the circumstances characterizing the transaction and the general course of business as conducted by the insurance company through its agent. *Ibid.*

3. The unexplained delivery of a policy without payment of the premium is *prima facie* proof of an extension of credit. *Ibid.*

4. Although there was no direct contradiction of the testimony of an agent that he told the assured that an accident policy would not go into effect until the premium was paid, yet, there being circumstances bearing on the credibility of such testimony, a finding by the jury that the assured (who was accidentally killed before paying the premium) and the agent did not agree that the policy should not take effect until such payment, is *held* not clearly wrong. *Ibid.*

5. An instruction to "collect and report" sent with the policy to the agent, who promptly sent the policy by mail to the assured without prepayment of the premium, did not preclude the completion of the contract by such delivery of the policy,—the jury having found that credit was extended to the assured. *Ibid.*

6. The fact that the policy was sent to the assured by registered letter, a receipt for which was demanded, and with direction for return if not called for in five days, does not necessarily show that the delivery was conditional or the contract incomplete, where it appears that the letter remained in the delivery office for some weeks to the knowledge of the agent, who did not order it back but wrote to the assured to send on the premium. *Ibid.*

7. The fact that the policy was sent to the assured without prepayment of the premium and with a letter asking for prompt payment was sufficient to warrant submitting to the jury the question whether there was an extension of credit to the assured which relieved him from the obligation to pay until after he received the policy; and evidence as to previous dealings with the assured and others and the general manner of doing business through the agent was competent upon that question. *Ibid.*

8. Where an insurance company issued a policy upon application of the assured and sent it to him by mail, trusting him to pay after receipt thereof, and he did not repudiate his offer to take it, he became obligated to pay therefor and the policy became operative. *Ibid.*

Default in payment of premiums: Credit.

9. Where credit was extended to the assured he was not in default within the meaning of a provision in the policy to the effect that in case of default in payment of any premium the policy would not be in force during the period of default so as to cover any loss sustained during that period. *Hartwig v. Ætna L. Ins. Co.* 20

Unpaid premiums: Deduction from amount recovered: Interest.

10. A premium for which credit had been extended and which was unpaid at the time of the death of the assured should be credited on the indebtedness of the insurer under the policy. *Hartwig v. Ætna L. Ins. Co.* 20

11. The matter of deducting an unpaid premium from the amount recovered on an insurance policy not having been brought to the attention of the trial court, the deduction is made on appeal without taking account of interest thereon and without affecting the costs. *Ibid.*

Fire insurance: Standard policy: Construction: "Chattel mortgage."

12. A so-called trust deed, given to secure a loan, which described and conveyed certain land, "together with all the privileges and appurtenances . . . , including therein any and all buildings, improvements, machinery, tools, implements, and fixtures, whether attached or unattached to the said real estate, . . . and all machinery and fixtures hereinafter installed, and also any and all tools and implements used by [the grantor] in or about the premises," is *held* to have covered fixtures only which were a part of the realty, and not to have been an incumbrance of personal property "by a chattel mortgage" within the meaning of sec. 1941—46, Stats. *Stocker v. Dubuque F. & M. Ins. Co.* 614

Same: Proofs of loss: Waiver.

13. An absolute denial of liability by an insurance company within the time limited for the furnishing of proof of loss renders that act unnecessary, even though the policy provides that failure to furnish such proof shall render the claim void. *Kutschenreuter v. Providence Washington Ins. Co.* 63

Same: Proofs of loss not evidence of loss. See INSTRUCTIONS TO JURY, 2.

Board of fire underwriters: Fire patrol: Right of way on streets. See MUNICIPAL CORPORATIONS, 1–3.

Accident insurance. See INSURANCE, 1–11.

Indemnity insurance: Employers' liability. See BANKRUPTCY. JUDGMENT, 2. MASTER AND SERVANT, 8.

Same: Rights of injured employee: Privity of contract: Payment of loss by assured.

14. A policy by which the insurer agrees to indemnify an employer against loss from the liability imposed by law on account of injuries to his employees, and providing that no action shall be brought under it unless brought by the assured for a loss actually sustained by his payment in money of a final judgment rendered in a suit against him, is a contract to indemnify the assured alone, and there is no privity of contract between the insurer and an injured employee. *Eberlein v. Fidelity & D. Co.* 242

15. Payment of the loss by the assured is a condition precedent to his right to maintain an action on such a policy. [Whether under the provision above stated a payment otherwise than in money would satisfy the condition, is not decided.] *Ibid.*

16. After a judgment had been rendered against the assured in favor of an injured employee, the assured, being then bankrupt and without funds, obtained from a bank money to the amount of such judgment, the bank taking the note of the assured, indorsed by the attorney for the employee. The money was handed to said attorney, who gave the assured a satisfaction of the judgment but retained the money as security for his indorsement, it being agreed that the employee was not to receive any of it unless the attorney should be successful in collecting the insurance, the claim for which, under the policy, was assigned to him. *Held*, that such transaction did not constitute a payment of the loss by the assured such as would give a right of action on the policy. *Ibid.*

INTENTION. See ELECTIONS, 7–9. FRAUDULENT CONVEYANCES, 1, 2. TRUSTS AND TRUSTEES, 1. WILLS, 4–8.

INTEREST. See CONTRACTS, 16. INSURANCE, 11. SCHOOLS AND SCHOOL DISTRICTS, 5. TRUSTS AND TRUSTEES, 3–5. WILLS, 10.

INTERLOCUTORY JUDGMENT. See MANDAMUS, 4.

INTERPLEADER. See PARTIES.

JEOPARDY. See CRIMINAL LAW.

JOINDER.
Of causes of action. See FRAUD, 2.
Of parties. See JUDGMENT, 1, 2. MANDAMUS, 1, 2. MECHANICS' LIENS, 7.

JOINT TORTFEASORS. See EXECUTION. NEGLIGENCE, 7.

JUDGES.

Circuit judges: Removal: Shortening term of office.

1. In view of sec. 13, art. VII, Const. (prescribing the method by which a circuit judge may be removed), and sec. 6, art. VII (providing that no alteration of the boundaries of a circuit shall have the effect to remove a judge from office), the power of the legislature under sec. 7, art. VII, to fix the term of office of circuit judges cannot be so exercised as to have the effect of removing a circuit judge from office. Ch. 6, Laws 1915, shortening by one year the term of one of the judges for the Second circuit, was therefore void. *State ex rel. Kleist v. Donald,* 545

2. The fact that such judge voluntarily submitted himself as a candidate at an election held pursuant to said ch. 6, Laws 1915, was

not an effective consent to the shortening of his term, a public right being involved which could not be affected in that way. *Ibid.*

Prejudice: Changing place of trial. See COURTS, 5.

JUDGMENT.

On trial of issues: Form. See CARRIERS, 6.

Same: When personal judgment proper. See MECHANICS' LIENS, 8, 10.

Construction. See EXECUTORS, 7.

Conclusiveness of adjudication. See EXECUTORS, 5. NEGLIGENCE, 8. WILLS, 2.

1. Where the defense in an action is duly tendered to one who may under any aspect of the case be liable over to the party sued, the person to whom the defense is tendered and who has opportunity to defend becomes in legal effect a party to the action and is bound by the judgment. The estoppel of the judgment in such case is mutual. *American Candy Co. v. Ætna L. Ins. Co.* 266
2. Upon being sued for injuries to a minor employee the employer tendered the defense of the action to an insurance company in which it held a liability policy. The insurance company refused to defend except on condition that it be not bound by the result, claiming that the minor had been employed contrary to law and that the policy did not cover the injury. The employer refused to consent to a defense under such reservation, and itself defended the action. It was found therein that the minor was employed in violation of law, and he recovered a judgment, which the employer paid. In an action against the insurance company to recover the amount so paid it is *held* that said judgment is conclusive of the fact that the minor was employed in violation of law. *Ibid.*

Same: Judgment in criminal action.

3. A judgment in a criminal proceeding is neither a bar to a subsequent civil proceeding involving the same state of facts, nor is it proof of anything in the later proceeding except of the fact of conviction. *State v. Little,* 367

Foreign judgment: Faith and credit. See DIVORCE, 5–7.

Enforcement: Suspension: Lien on land. See COURTS, 8, 9. MORTGAGES, 2–6.

4. Unless an entry of the fact of suspension of the enforcement of a judgment is made on the docket as provided in sec. 2902, Stats., there is no interruption of the running of the ten-year period during which, under said section, the judgment is a lien on the debtor's real estate. *Delle v. Boss,* 392
5. Under sec. 2978, Stats., the enforcement of a judgment by execution is suspended for one year after the death of the judgment debtor. *Ibid.*
6. Except for the purpose of enforcing an existing lien on real or personal property, our statutes do not contemplate the issuance of an execution against the property of a deceased judgment debtor, but rather that the whole estate should pass to the administrator or executor, not to be interfered with by the levy of executions except in case of a specific lien, but to be administered under the direction of the county court, upon proper presentation of claims to that court. *Ibid.*

Satisfaction of judgment. See CREDITORS' ACTION, 2.

Action on judgment. See MORTGAGES, 2.

Same: Enforcing foreign judgment. See DIVORCE, 5–7.

JURISDICTION.
Supreme court. See COURTS, 2–4.
Circuit and county courts. See COURTS, 5–9. WILLS, 1, 2.
Justices' courts. See COURTS, 10.
Railroad commission. See NAVIGABLE WATERS, 4.
Tax commission. See TAXATION, 1.
Industrial commission. See CONSTITUTIONAL LAW, 3.
Highway commission. See HIGHWAYS AND BRIDGES, 6, 7.

JURY.

Selection of jury.

1. Independently of sec. 2849, Stats., the circuit court may in its discretion excuse a juror because his relations to either party to the action are such as would be liable to operate prejudicially in the case. *Milwaukee S. T. & D. Co. v. Am. Cent. Ins. Co.* 298
2. Failure to object to the collected jury before they are finally sworn is a waiver of any precedent error in their selection. *Ibid.*

Questions for jury. See TRIAL.

Instructing jury. See INSTRUCTIONS TO JURY.

JUSTICES' COURTS: Jurisdiction. See COURTS, 10.

LABOR: Hours: Limiting. See CONSTITUTIONAL LAW, 1–3. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 4–10.

LACHES. See ABATEMENT AND REVIVAL. DEEDS, 7. MORTGAGES, 5. PUBLIC UTILITIES, 11.

LAND CONTRACT. See EXECUTORS, 6, 7. VENDOR AND PURCHASER.

LAW OF THE ROAD. See AUTOMOBILES, 2.

LEGISLATIVE POWER. See CONSTITUTIONAL POWER, 1–3. COURTS, 1, 10. HIGHWAYS AND BRIDGES, 6, 7, 10. NAVIGABLE WATERS, 4.

LEWDNESS. See NUISANCES.

LIBEL AND SLANDER.

See COSTS, 3.

1. Spoken words which falsely impute to a woman a want of chastity and in their ordinary meaning charge her with a criminal offense are actionable *per se.* *M—— v. J——,* 39
2. To render such an utterance nonactionable on the ground that the hearers did not understand the colloquium to charge the offense conveyed by the words spoken, it must be shown to the satisfaction of the jury that the words were not intended to impute to the person concerned the offense they ordinarily convey. *Ibid.*
3. The construction or understanding testified to by witnesses cannot control the court or jury as to the meaning actually conveyed. *Ibid.*

LICENSE.
To do business in state. See CORPORATIONS, 9.
To practice medicine: Revocation. See PHYSICIANS AND SURGEONS.

LIENS.
On land. See COURTS, 8. DEEDS, 5–7. JUDGMENT, 4–6.
Of mortgage. See MORTGAGES, 1, 3.
Of mechanics, etc. See MECHANICS' LIENS.
On securities wrongfully taken. See TRUSTS AND TRUSTEES, 8.

LIMITATION OF ACTIONS.

See DEEDS, 7. MORTGAGES, 2–6.

1. In order that advantage may be taken of the bar of the statute of limitations it must be specially pleaded. *Will of Brandon*, 387
2. Statutes creating limitations are to be reasonably and fairly construed, but should not be extended by construction. *Fish v. Collins*, 457

MALFEASANCE. See OFFICERS, 2, 3.

MANDAMUS.

Parties: Compelling issuance of certificate of election.

1. Where the judgment in a *mandamus* proceeding to compel the issuance of a certificate of election to the relator neither diminishes nor enlarges the rights of the incumbent of the office, failure to make him a party is immaterial. *State ex rel. Kleist v. Donald*, 545

Same: Compelling appropriation by county board.

2. The county clerk is a proper party to a proceeding by *mandamus* to compel the appropriation by the county board of the county's share of the cost of a bridge over a navigable stream. *State ex rel. Owen v. Stevenson*, 569

Compelling action by county board: Special meeting.

3. A writ of *mandamus* may be awarded commanding the members of a county board to proceed to perform a duty imposed upon them by law, either at a special meeting of the board or at the regular meeting or an adjournment thereof. *State ex rel. Owen v. Stevenson*, 569

Same: Appropriation for bridge: Condition precedent. See HIGHWAYS AND BRIDGES, 2.

Compelling city comptroller to countersign warrant: Refusal: Justification.

4. Where, pending an appeal from an order overruling a demurrer to the relation and refusing to quash the alternative writ, in a *mandamus* proceeding to compel the city comptroller of Milwaukee to countersign a warrant for the refund of excessive taxes, the circuit court entered an interlocutory judgment awarding the peremptory writ and commanding the comptroller to countersign the warrant, sec. 925—260*m*, Stats., did not authorize the comptroller to refuse to do so, even though he was advised by the city attorney that a doubt existed as to the legality of the relator's claim. *State ex rel. Pabst Brewing Co. v. Kotecki*, 69
5. Nor would such a refusal be justified by any desire of the city to plead as a defense in the action that the relator had unlawfully concealed assessable property from the assessors and hence was not entitled to recover the unlawful taxes paid. *Ibid.*

Same: Stay of proceedings on appeal. See APPEAL, 6, 7.

MARRIED WOMEN. See DIVORCE. HUSBAND AND WIFE.

MASTER AND SERVANT.

Contract of employment: Evidence. See HUSBAND AND WIFE.

1. A contract whereby defendant employed plaintiff by the week, with a provision for a yearly employment in case her services proved satisfactory, is *held* to have been closed by correspondence between the parties, and a subsequent letter from defendant to plaintiff, referring to "your acceptance of our proposition to manage one of our departments for the coming season," did not modify the contract but referred merely to management under the contract, the term of service to commence at the beginning of the coming season. *Dunning v. Lederer, S. & Co.* 399
2. The contract being express, the custom as to employment for the season was immaterial. *Ibid.*

Termination of contract: Discharge of employee.

3. Findings by the jury that defendant was not in good faith dissatisfied with plaintiff's services and did not discharge her for that cause are *held*, upon the undisputed evidence, to have been properly changed by the trial court. *Dunning v. Lederer, S. & Co.* 399
4. A contract provided that the services of an employee thereunder might be terminated by the employer at any time without notice if the employee should be found to have been guilty of negligence, inattention to his duties, shortage in his accounts, etc., or might be terminated at any time by either party upon giving to the other two weeks' notice thereof in writing. In an action based on said contract, findings by the trial court that the employer did not resort to either of said methods, but arbitrarily discharged the employee without notice and without cause and in violation of the contract, are *held* to be sustained by the evidence. *Jewel Tea Co. v. Himmelstein,* 325
5. A further provision in said contract that the employee would not, while in the employment or within one year "after termination of his services with or without cause," engage in the same line of business, directly or indirectly, for himself or for any one else, or interfere in any way with the employer's trade, was not an independent condition of the contract which could be enforced regardless of an unlawful discharge of the employee; and in an action to restrain the employee, after his wrongful discharge, from violating such provision, the court might properly, in its discretion, deny that relief on the ground that the employer had itself breached the contract. *Ibid.*
6. The termination of the employee's services "with or without cause," spoken of in the contract, must be construed to mean a termination in one or the other of the two methods specified therein. *Ibid.*

Hours of labor: Limiting, on public works. See CONSTITUTIONAL LAW, 1, 2. MUNICIPAL CORPORATIONS, 4–10.

Same: Employment of women. See CONSTITUTIONAL LAW, 3.

7. Sec. 1728—2, Stats. 1915, which, until the industrial commission shall issue general or special orders on the subject, forbids the employment of any female "at day work [between 6 a. m. and 8 p. m.] more than ten hours in any one day, or more than fifty-five hours in any one week," or "at night work [between 8 p. m. and 6 a. m.] more than eight hours in any one night, or more

than forty-eight hours in any one week," limits to ten hours the time during which women may be employed in any one calendar day, where the work is done partly before and partly after 8 p. m. *State v. Lange Canning Co.* 228

Minors: Unlawful employment: Dangerous machines. See JUDGMENT, 2.

8. Although the original employment of a minor fifteen years of age who had a permit was lawful, yet when he was put to work at a machine dangerous to life or limb contrary to sub. 2, sec. 1728*a*, Stats. (Laws 1909, ch. 338), he was "employed in violation of law as to age," within the meaning of an exception in an employers' liability insurance policy. *American C. Co. v. Ætna L. Ins. Co.* 266

9. In said sub. 2, sec. 1728*a*, Stats.,—providing that "no child under the age of sixteen years shall be employed in" operating any of numerous machines specified "or in any other employment dangerous to life or limb," etc.,—the word "employed" covers a case of putting such a child to work at a machine, and the putting him or directing him to work in such a place is an employment to work in such place. *Ibid.*

Master's liability for injuries. See WORKMEN'S COMPENSATION.

Same: Simple tools: Hidden defect.

10. The handle of a hammer or maul, the breaking of which resulted in injury to an employee, is *held* upon the evidence in this case to have been a simple tool which the employer was not bound, in the exercise of ordinary care, to inspect or test; and the evidence is further *held* to sustain a finding by the jury that the defect in said handle was not observable by the exercise of ordinary care. *Kolasinski v. Chicago, M. & St. P. R. Co.* 50

Same: Unsafe working place.

11. In an action for personal injuries caused by the fall of a two-ton iron roller which had been standing for two days on its fifteen-inch rim on a sand floor in defendant's factory, evidence as to the jarring of the roller or of the floor by the operation of machinery was admissible as bearing upon the question of the security of the foundation on which the roller rested, even though the machinery or some of it was not being operated at the time of the accident. *Adams v. Bucyrus Co.* 146

12. The evidence in such case as to the condition of the floor or sand on which the roller stood is *held* to justify an inference that the fall of the roller was due to the insecurity of the uneven sand foundation on which it rested, and to warrant a finding by the jury that plaintiff's working place near the roller was not reasonably safe. *Ibid.*

13. The refusal in such case to submit in the special verdict a separate question as to what caused the tipping over of the roller was not a prejudicial error. *Ibid.*

Same: Independent contractors.

14. In an action to recover for the death of an employee due to the fact that his working place was unsafe, if the defendant was in possession of and furnished the working place and it was unsafe at the start or was rendered so by defendant's operations while the work of the employee was in progress, the defendant cannot

escape liability on the ground that the immediate employer of the decedent was an independent contractor. *Engel v. T. L. Smith Co.* 515

15. In an action for the death of an employee of a subcontractor, claimed to have been caused by the negligence of defendant, who had the principal contract to furnish a rock-crushing plant to a county, the evidence is *held* to show that defendant was in the possession of the plant at the time of the accident, and was therefore responsible for the safety of the working place of the deceased, if at that time the machinery was being operated by defendant's authority. *Ibid.*

16. There being ample evidence to sustain findings by the jury that the working place of the deceased was not as safe as the nature of the employment would reasonably permit, that the machinery was started, at the time of the accident, by a county employee by direction of defendant's agent, and that the agent had authority to give such direction, the trial court erred in changing the finding that the agent gave such direction and also in changing a finding that defendant's failure to furnish a safe working place was the proximate cause of the accident. *Ibid.*

Same: Federal and state statutes.

17. Where an action for injuries to a railway employee is governed by the federal Employers' Liability Act, the safe-place rule under the state statute is inapplicable. *Kolasinski v. Chicago, M. & St. P. R. Co.* 50

Same: Negligence of fellow-servants.

18. In an action for personal injuries alleged to have been caused by negligence of fellow-servants in throwing or dropping one end of a heavy timber which plaintiff and three others were moving across a railroad track, it is *held* that no negligence was shown, all the evidence being consistent with the theory that the timber fell by accident. *Munia v. Chicago & N. W. R. Co.* 512

19. Plaintiff's testimony in such case that the timber was thrown is not entitled to weight, he having admitted that he did not see it thrown, and that he was not looking, so that all he knew was that it dropped or fell from the hands of the men at the opposite end. *Ibid.*

Indemnity insurance: Rights of injured employee: Privity of contract. See INSURANCE, 14.

Claim for injury not a debt provable in bankruptcy. See BANKRUPTCY.

MATERIALMEN. See MECHANICS' LIENS.

MAXIMS.
Expressio unius est exclusio alterius, 551.
Ignorance of the law affords no excuse for its violation, 545, 552.
Qui hæret in litera hæret in cortice, 172.
Res ipsa loquitur, 544.
Res judicata pro veritate accipitur, 380, 383.
That is certain which may be rendered certain, 17.

MEASURE OF DAMAGES. See DAMAGES, 1.

MECHANICS' LIENS.

Government buildings: Exemption from lien.

1. Government buildings are exempt from the operation of the mechanic's lien statute. *Wisconsin B. Co. v. National S. Co.* 585

Same: Bond of contractor: Extent of remedy: Carriers of materials.

2. Sec. 3327*a*, Stats.,—requiring a bond to be given for the payment of all claims "for work or labor performed, and material furnished in and about" the erection of any building for the state,—was not intended to give a remedy more extensive than that given by the mechanic's lien statute, nor to give a remedy to any different classes of persons. *Wisconsin B. Co. v. Nat. S. Co.* 585

3. A common carrier which, in the exercise of its ordinary functions, transports building material consigned by others to the principal contractor for a private building, is not entitled, under sec. 3315, Stats., to a lien on such building for the freight charges; nor does the bond required by sec. 3327*a* cover such charges in the case of a state building. *Ibid.*

Notice of claim: Sufficiency.

4. The right to a lien given by sec. 3315, Stats. 1911, was lost if the notice of claim of lien given pursuant to that section failed to comply with the statutory requirements. *Carl Miller L. Co. v. Elfers,* 215

5. A notice of claim of lien which recited that the claimant was a lumber dealer, but contained no statement as to what materials were furnished by it, was not a sufficient compliance with sec. 3315, Stats. 1911. *Ibid.*

Lien for repairs: Priority.

6. The mechanic's lien given by sec. 3343, Stats., for repairs upon personal property is superior to the lien of a duly filed prior mortgage upon the property. *Jesse A. Smith A. Co. v. Kaestner,* 205

Enforcement of liens: Nature of action: Parties: Personal judgment: Priorities.

7. An action to enforce a mechanic's lien, though statutory, is equitable in its nature, and all persons having or claiming to have interests germane to the primary rights involved may properly be made parties, and the whole matter adjudicated as in an ordinary equitable action. *Milwaukee S. S. Co. v. Borun,* 502

8. In such an action the court is not confined to the precise relief asked for in the complaint, but may give such further relief as the facts established by the evidence require in order to do full justice, including a personal judgment against all parties who became liable with the primary debtor for payment of the lien claims. *Ibid.*

9. Where the vendors of land had taken back a purchase-money mortgage and had induced the furnishing of labor and materials for the erection of a building on the land by promising to advance the necessary money to the owner and representing that

the mortgage interest would be subject to the rights of the persons furnishing such labor and materials, a judgment giving the liens of such persons priority over the mortgage was justified under the doctrine of estoppel *in pais*. *Ibid.*

10. But in the absence of any promise by said vendors, either to the owner or to the lien claimants, to pay the indebtedness incurred in erecting the building, a personal judgment against the vendors in the lien action was not warranted. *Ibid.*

MEETINGS of county board. See MANDAMUS, 3.

MILLS AND MILLDAMS.

"Navigable" rivers: Hydroelectric plants: Flowage of land: Remedies.

1. A river which has never been meandered or declared by the legislature to be a navigable river is not shown to be "navigable" within the meaning of sec. 3374, Stats. 1898, by the mere fact that it is so far capable of floating logs as to entitle the public to a right of way therein for that purpose. *McDonald v. Apple River Power Co.* 450

2. A hydroelectric plant used to generate electricity for lighting and power purposes, etc., is a "water mill" within the meaning of sec. 3374, Stats. *Ibid.*

3. The flooding of lands by the erection and maintenance of a dam to furnish power for such a plant is a taking of the lands for a public use, authorized by the milldam law (secs. 3374–3402, Stats.); and the only remedy of the landowners is that provided by said law. *Ibid.*

4. An action by owners of lands so flooded to abate the dam and recover damages for the flowage need not be dismissed, but, under sec. 2836*b*, Stats. 1915, may be treated as an action to obtain compensation and other appropriate relief under the milldam law. *Ibid.*

Storage dams. See NAVIGABLE WATERS.

MILWAUKEE CIVIL COURT. See APPEAL, 24–26.

MINORS. See INFANTS. MASTER AND SERVANT, 8, 9.

MISTAKE. See REFORMATION OF INSTRUMENTS. VENDOR AND PURCHASER, 2.

MISTAKE as to court or remedy. See COURTS, 9. MILLS AND MILLDAMS, 4.

MORTGAGES.

Lien: Condemnation of mortgaged property.

1. The lien of a mortgage extends to the award made in proceedings for condemnation of the mortgaged property. *Connell v. Kaukauna,* 471

Priority of mechanic's lien. See MECHANICS' LIENS, 6, 9.

Foreclosure: Personal liability of administrator: Judgment. See EXECUTORS AND ADMINISTRATORS, 6, 7.

Same: Sale under judgment: Limitation: Laches.

2. The time within which land may be sold under a foreclosure judgment is not limited to twenty years from the rendition of the judgment. Such a proceeding is not an "action" upon the judg-

ment within the meaning of sub. (1), sec. 4420, Stats. *Fish v. Collins*, 457

3. The fact that the personal liability of the mortgagor is extinguished does not preclude enforcement of the lien of the mortgage established by the judgment. *Ibid.*

4. Sec. 2968, Stats.,—which provides, among other things, that "in no case shall an execution be issued or any proceedings had upon any judgment after twenty years from the time of the rendition thereof,"—applies only to judgments on which execution may issue, and hence is not applicable to a judgment of foreclosure and sale until the coming in of the report of sale and the rendition of judgment for deficiency thereon. *Ibid.*

5. Evidence showing, among other things, that a mortgagee foreclosed the mortgage in 1890; that in 1895 he attempted to sell the land under the judgment, but no report of sale was ever made, no deed executed, and the sale was never confirmed; that he and the mortgagor were neighbors and friends; that during the years 1896 and 1897 he rented the land to a third person; that he supposed until 1914 that he had a deed of the premises and then, upon discovering that he had not, took steps to enforce his judgment,—is *held* to sustain a finding of the trial court that he was not guilty of laches. *Ibid.*

6. The right to sell land under a foreclosure judgment more than twenty years after its rendition not being barred by any provision of ch. 177, Stats., the statute cannot be extended so as to bar such right, on the ground of a supposed legislative policy to provide a limitation as to all claims. *Ibid.*

Trust deeds. See PUBLIC UTILITIES, 4, 6–11. TRUSTS, 3–5.

MOTOR VEHICLES. See AUTOMOBILES. MUNICIPAL CORPORATIONS, 3.

MUNICIPAL CORPORATIONS.

Fire patrol which assists city in discharging public duty: Right of way on streets: Ordinances.

1. Although a board of fire underwriters organized, among other purposes, to maintain a fire patrol is not a municipal corporation, yet such patrol, which under legislative authority assists the city in discharging a public duty and while so doing is subject to the control of the head of the city fire department, may properly be given, by a city ordinance, the right of way over other vehicles (except those carrying United States mail) on the city streets when going to or returning from a fire. *Sutter v. Milwaukee Board of Fire Underwriters*, 532

2. Although in seeking, through such fire patrol, to "discover and prevent fires and to save and preserve life and property at fires," the board of fire underwriters is primarily endeavoring to protect its own business interests, that work is none the less a public work which, if performed by the city itself, would be governmental; and the fact that its performance is primarily induced by private interest does not affect the power of the city to protect and aid the service by passing said ordinance. *Ibid.*

3. Secs. 1636—51, 1636—55, Stats., giving the owners of motor vehicles "equal rights upon all public highways of this state with all other users of such highways," does not preclude the enactment of such an ordinance or interfere in any way with the

power of the municipality to make regulations as to the use of its streets in the proper exercise of the police power. *Ibid.*

Regulation of weights and measures: Ordinances. See WEIGHTS AND MEASURES.

Public works: Limiting hours of labor: Ordinances.

4. Although the power to prescribe the conditions under which public works shall be carried on by cities is primarily in the state, yet, subject to the constitutional limitation as to indebtedness and certain prescribed rules of procedure, the whole matter of providing public works in cities has been delegated to the cities themselves; and, as an incident to its power in that regard, a city has the same inherent power that the state has to prescribe the conditions upon which the work shall be done, including the power to fix the hours during which those employed shall be permitted to labor. *Milwaukee v. Raulf,* 172

5. The fact that in its proprietary capacity a city has, as a part of its contractual powers, the incidental authority to limit the hours of labor on public works, does not prevent it in its governmental capacity from enforcing the limitation by ordinance. *Ibid.*

6. Under the general welfare clause in its charter the city of Milwaukee had power to enact an ordinance limiting to eight hours per day the employment, by the city or by any contractor, of laborers and mechanics upon any of the public works of the city, and to impose a penalty for violation of such ordinance; and upon the adoption of such ordinance it had the force and effect of a law and became a part of every contract relating to such public works. *Ibid.*

[7. Whether, in the absence of authority expressly conferred in the charter, such an ordinance could lawfully provide that its violation should be punished by imprisonment, is not decided.] *Ibid.*

8. Such an ordinance limiting the hours of employment on public works does not conflict with a provision in the city charter requiring all contracts for such works to be let to the lowest bidder. *Ibid.*

9. An ordinance limiting to eight hours per day the employment of laborers and mechanics upon any of the public works of the city is *held* in this case not unreasonable, although no provision is made therein for overtime except "in case of extraordinary emergency," and although the cost of the public works will be greatly increased thereby, as compared with the cost of doing the work under a ten-hour schedule. *Ibid.*

10. The intention of such ordinance is that work theretofore done usually, ordinarily, and customarily during the nine- or ten-hour period should be done by persons employed upon public works for eight hours instead of nine or ten hours. *Ibid.*

Acquirement of public utilities. See PUBLIC UTILITIES.

Construction of bridges over navigable rivers. See HIGHWAYS AND BRIDGES, 1–10.

Officers: Bonds on appeal. See APPEAL, 7.

Same: Withholding payments when legality questioned, etc. See MANDAMUS, 4, 5.

Streets: Dedication: Rights of public: Estoppel. See PLATTING LANDS, 2–5.

11. The city authorities have charge of and represent the rights of the public in and to the public streets, and their acts may be such as to lay the foundation for an equitable estoppel against the assertion of such rights; but in order that such an estoppel *in pais* may arise there must be inequitable conduct on the part of the city and irreparable injury to persons honestly and in good faith relying thereon. *Superior v. Northwestern F. Co.* 631

Same: Regulation of use: Right of way. See MUNICIPAL CORPORATIONS, 1–3.

Same: Defects: Injury: Liability.

12. After an alley had been used for several years and the approach thereto, from the roadway of a street to the lot line, and its condition and use had been acquiesced in and adopted by the city, the city built a sidewalk with longitudinal grooves in its surface and returned the curb to the sidewalk line, thus showing its assent to the continuance of the use of the alley. It left, however, a perpendicular drop of about twelve inches from the edge of the walk to the surface of the street. *Held* that, by so creating a defect within the limits of the street and by failing to restore the alley temporarily to a reasonably safe state for travel, the city made itself liable for an injury, caused by such defect, to a person driving out of the alley, even though it was under no obligation to make a permanent safe approach to the alley. *Frankfort General Ins. Co. v. Milwaukee,* 77

Same: Notice of injury.

13. Where in an action for injury to a person driving out of an alley to a street, caused by a twelve-inch drop from the edge of the sidewalk to the surface of the street, the city put in evidence a plat showing the exact character of such drop, and there was no claim that the city was misled by any insufficiency in the notice of injury, inaccuracy in describing the place or failure to describe the defect which caused the injury did not render the notice invalid. *Frankfort General Ins. Co. v. Milwaukee,* 77

NAVIGABLE WATERS.

See HIGHWAYS AND BRIDGES, 1–11. MILLS AND MILLDAMS.

Reservoir dams: Regulation of levels and flow: Powers of railroad commission: Flowage rights: Prescription.

1. Although the primary purpose of ch. 640, Laws 1911,—authorizing the plaintiff company to construct, acquire, maintain, and operate a system of reservoirs on the headwaters of the Chippewa and Flambeau rivers,—was the storage of large quantities of water for creation and utilization of power, yet *it seems* that the legislature had also in mind the general welfare on all said waters, including the small lakes which are at the headwaters of the rivers named and are really mere enlargements of the rivers themselves. *Chippewa & F. Imp. Co. v. Railroad Comm.* 105

2. Ch. 380, Laws 1915 (sec. 1596—2, Stats.),—empowering the railroad commission, "in the interest of public rights in navigable waters or to promote safety and protect life, health and property," to regulate and control the level and flow of water in all

navigable waters and to designate "the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters," etc.,—announces a general policy as to all the navigable waters of the state which is applicable to the reservoir dams operated by the plaintiff under the authority of ch. 640, Laws 1911. *Ibid.*

3. Ch. 640, Laws 1911 (in which the right to repeal or amend at any time was specifically reserved), was amended by said ch. 380, Laws 1915; and under the latter act the railroad commission was authorized to take into consideration, in fixing levels, the property rights and interests of riparian owners on the lakes at the headwaters of the rivers named in the act of 1911. *Ibid.*

4. Having enacted such general law (ch. 380, Laws 1915) in effect declaring that water may not be maintained in any dam in navigable waters at a level which is injurious to the public rights in such waters, or which threatens safety, or imperils life, health, and property, the legislature might properly endow the railroad commission with power to investigate and ascertain the facts and to make such regulations and orders as may be necessary to carry into effect the law in concrete cases; and in so doing it did not delegate legislative power to the commission or confer judicial power upon it. *Ibid.*

5. Under sub. 2, sec. 1, ch. 640, Laws 1911,—which preserves to the plaintiff company, on its purchase of an existing dam, all franchises and flowage rights, either perfected or inchoate, possessed by the former owner at the time of the sale,—the burden of proof is on the plaintiff to show that it possesses such rights with respect to a dam at which water levels are fixed by the railroad commission under ch. 380, Laws 1915. *Ibid.*

6. Possession of flowage rights on a part of the shore of a reservoir gives no right to flood that part of the shore owned by others. *Ibid.*

7. Prescriptive rights in an easement are commensurate only with the actual enjoyment of the easement. *Ibid.*

8. Thus, if the water of a dam is kept up only during certain months of the year for the period necessary to create a prescriptive right, the owner of the flowed land being in possession at all other times, no right will be thereby acquired to keep the water up during the remaining months. *Ibid.*

9. Maintenance of a log-driving dam by which a head of water is raised in the early spring but immediately reduced by the use of the water in successive rapid miniature floods during the spring months, so that ordinarily the dam is empty at the beginning of the summer and so remains, gives no prescriptive right of flowage by means of a reservoir dam devoted to the storing of large quantities of water in the spring or wet seasons, to be gradually depleted in times of drouth for the purpose of producing as nearly as possible a uniform flow of water at all seasons in the river below the dam; and a prescriptive right to flow lands by a log-driving dam was not available to the plaintiff company which had bound itself, by acceptance of its charter, to use the dam as a reservoir dam. *Ibid.*

NEGLIGENCE.

See APPEAL, 10, 12, 18. AUTOMOBILES. CARRIERS, 7–11. ELECTRICITY. EXECUTION. HIGHWAYS, 16–18. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 8–19. MUNICIPAL CORPORATIONS, 12, 13. PARTIES. RAILROADS, 5–11. STREET AND INTERURBAN RAILWAYS.

Poisonous matches: Delivery by grocer: Injury to child. See POISONS.

1. Where phosphorous matches were delivered by a grocery company with other goods at a dwelling in the manner in which such deliveries were customarily made under similar circumstances, and the company could not have anticipated injury to another by reason of the delivery in such manner, it was not guilty of any negligence rendering it liable for the death of a child who opened the package and ate off the heads of some of the matches. *Stasek v. Banner Coffee Co.* 538

Proximate cause: Anticipation of injury.

2. An injury is not proximately caused by a negligent act unless the wrongdoer ought reasonably to have anticipated that an injury to some person would result therefrom; but the resulting damages are proximately related to the injury if they follow it as a natural consequence by an unbroken chain of causation, even though the wrongdoer had no reasonable ground to anticipate that such damages would result from his negligent act. *LeBeau v. Minneapolis, St. P. & S. S. M. R. Co.* 30

Actions: Questions for jury.

3. Contributory negligence is a defense which must be affirmatively established, and the question is ordinarily one for the jury. *Schmidt v. Franklin,* 128
4. Where the evidence in a personal injury action for negligence is conflicting, or where the inferences to be drawn therefrom are doubtful and uncertain, the questions of negligence are for the jury. *Friedrich v. Boulton,* 526
5. A nonsuit in an action for a personal injury on the ground of negligence is only proper when there is an entire want of evidence tending to show that defendant was negligent or when the evidence conclusively shows that the plaintiff's negligence contributed to produce the injury. *Ibid.*

Same: Changing findings of jury.

6. Where in an action for death alleged to have been caused by negligence the jury found specifically facts which absolutely negatived actionable negligence, the trial court properly changed or set aside other findings in the verdict to the effect that defendant was negligent and that such negligence was the proximate cause of the death. *Stasek v. Banner Coffee Co.* 538

Same: Contribution between defendants: Execution: Evidence: Arguments of counsel: Harmless errors.

7. Where plaintiff was injured in a collision between a street car operated by the defendant electric company and a wagon driven by an employee of the defendant fuel company, and the jury found that the negligence of both defendants proximately caused the injury, the court properly denied the motion of the defendant fuel company to have the judgment direct the execution to be first satisfied out of the property of the defendant electric company. *Ertel v. Milwaukee E. R. & L. Co.* 380

8. The question whether either of said defendants would be entitled to contribution from the other being a matter with which they only are concerned, it was not involved in this case, and the trial court properly refused to allow the fuel company to amend its answer so as to allege that the question of the negligence of its driver was *res judicata*, or to put in evidence the verdict and judgment in an action by its driver against the electric company for injuries sustained in the collision, wherein it was determined that the driver was not guilty of any want of ordinary care that contributed to his injuries. *Ibid.*

9. It was error to refuse to permit the driver to answer a question, asked by counsel for the fuel company, as to whether, when he approached the tracks to drive across, he saw the car and thought that he could cross in safety; but such error does not constitute ground for reversal, the testimony of the driver, taken as a whole, clearly indicating that he claimed he did see the car and thought he could pass the tracks in safety. *Ibid.*

10. The fact that in the taking of certain affidavits the defendant fuel company was represented by an insurance company having been called out in connection with the introduction of the affidavits by the fuel company, the error in permitting counsel for the defendant electric company to comment upon the fact that an insurance company was interested in the defense was not a material one, prejudicial to the fuel company, where the trial court admonished and instructed the jury so that they clearly understood that such remarks of counsel were to be disregarded. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL. See APPEAL, 23.

NONSUIT. See NEGLIGENCE, 5.

NOTICE.
Of conditional delivery. See BILLS AND NOTES, 4.
Of dishonor. See BILLS AND NOTES, 5.
Of defect in car step. See CARRIERS, 10.
Of termination of contract. See CONTRACTS, 14.
Of election. See ELECTIONS, 1–4.
Of fraudulent intent. See FRAUDULENT CONVEYANCES.
To remove fences. See HIGHWAYS, 15.
Of claim of lien. See MECHANICS' LIENS, 4, 5.
Of injury. See MUNICIPAL CORPORATIONS, 13.
Terminating partnership. See PARTNERSHIP.
Of condemnation proceedings. See PUBLIC UTILITIES, 3–5, 11.
Of hearing before railroad commission. See PUBLIC UTILITIES, 6.

NUISANCES.

See COURTS, 6.

1. Property used for purposes of lewdness, assignation, or prostitution is a nuisance, and in an action under secs. 3185*b* to 3185*h*, Stats., upon a satisfactory showing of such use, a temporary injunction may be granted. *State ex rel. Zabel v. Greflg*, 74

[2. Whether the provision of sec. 3185*f*, Stats., to the effect that the building or place where such a nuisance is carried on may be closed for one year is constitutional, is not determined.] *Ibid.*

OBLIGATION OF CONTRACT: Impairing. See TAXATION, 11.

OFFICERS.

Election and appointment. See ELECTIONS. TOWNS.

Same: Ineligibility.

1. It is not necessary to the validity of an election that the person voted for should be then eligible to hold the office, if the electors in good faith believed he was and voted for him with that understanding. That he could not qualify would not affect the validity of his election, but merely his right to hold the office. *State ex rel. Schommer v. Vandenberg,* 628

Same: Failure to qualify: Vacancy. See TOWNS.

Removal: Shortening term of circuit judge. See JUDGES.

Malfeasance: Town chairman: Bounty certificates.

2. Where, at the request of the other members of the town board, a town chairman advanced money to pay bounties on gophers, hawks, and crows, and cashed certificates issued for such bounties, but discounted them sufficiently to reimburse himself for the interest on money which he borrowed for that purpose, such contracts of discount between the chairman and the owners of the certificates were not rendered void by secs. 4549, 4550, Stats. *Blaser v. Vanden Heuvel,* 98
3. The certificates so cashed having been filed with the town clerk, a claim for the amount thereof having been made by the town to the county board and allowed by it, and the money therefor having been paid to the town and by the town to the chairman, and it appearing that the claim was for the correct amount and that the sum paid by the county to the town was the amount lawfully due to the persons entitled to the bounties, a taxpayer of the county could not maintain an action to compel the town chairman to restore such sum to the county. *Ibid.*

County clerk. See MANDAMUS, 2.

City officers. See APPEAL, 7. MANDAMUS, 4, 5.

Town officers. See OFFICERS. TOWNS.

OPENING CASE. See TRIAL, 1.

OPINION EVIDENCE. See EVIDENCE, 4.

ORDINANCES. See AUTOMOBILES, 2. MUNICIPAL CORPORATIONS, 1–3, 5–10. WEIGHTS AND MEASURES.

PARENT AND CHILD.

Adoption: Contract: Enforcement. See ADOPTION.

Abandonment of children: Nonsupport.

1. Evidence *held* to sustain defendant's conviction, under sec. 4587c, Stats., of abandonment and wilful refusal to provide for the support of his minor children. *Adams v. State,* 223
2. The place where the children were, not where the father was, during the period complained of, fixes the venue of a prosecution for nonsupport of children. *Ibid.*
3. So *held,* where the information charged that on May 1, 1915, at Waukesha, defendant had deserted and refused to provide for the support of his children, and the evidence showed that on April 25, 1915, defendant's wife left their home in Racine and went with the children to Waukesha, and that defendant had

neglected and refused to support the children while they were living at Racine as well as while they were living at Waukesha. *Ibid.*

4. Such removal of the children by the wife to another county, whether with cause (as in this case) or without cause therefor, would not justify the father in refusing to support them. *Ibid.*

5. In a prosecution for nonsupport of children, under sec. 4587*c*, Stats., evidence of neglect by the father before and after the time charged may be considered. *Ibid.*

PAROL EVIDENCE affecting writings. See DISMISSAL AND NONSUIT, 4. SALES, 4.

PARTIAL DEPENDENCY on deceased. See WORKMEN'S COMPENSATION, 1.

PARTIES.

See COURTS, 8. JUDGMENT, 1, 2. MANDAMUS, 1, 2. MECHANICS' LIENS, 7.

The application of a defendant to have a third person, who would be liable over to the applicant, made a party defendant under sec. 2610, Stats., is addressed to the sound discretion of the court; and in this action, wherein the applicant (a corporation) was sought to be held liable for negligence of its servant, refusal to make the servant a party was not an abuse of such discretion. *Ertel v. Milwaukee E. R. & L. Co.* 380

PARTNERSHIP.

See REFORMATION OF INSTRUMENTS.

A partnership pursuant to which defendant was to occupy and operate for three years a farm owned by plaintiff and they were to share profits and losses equally, was dissolved "in contravention of the agreement between the partners" (sub. (2), sec. 1724*m*—26, Stats. 1915) by a written notice given by plaintiff declaring such agreement terminated on a date named prior to the expiration of the three years; and, the defendant not having in any manner complied with sub. 2, sec. 1724*m*—33, Stats., so as to entitle him to continue the business, his right to the possession of the farm terminated on the date named, even though at that time there had been no accounting including his claim against plaintiff for damages on account of the dissolution. *Crossman v. Gibney,* 395

PASSENGERS: Injury. See CARRIERS, 7–11.

PAYMENT. See BILLS AND NOTES, 6. INSURANCE, 14–16. PRINCIPAL AND SURETY, 4–6. PUBLIC UTILITIES, 7–11. REFORMATION OF INSTRUMENTS, 2. TRUSTS AND TRUSTEES, 3–5. WILLS, 9, 10.

PERFORMANCE. See ADOPTION. CONTRACTS, 1–3, 15.

PERSONAL INJURIES. See DAMAGES, 2. INFANTS, 3, 4. MASTER AND SERVANT, 8–19. MUNICIPAL CORPORATIONS, 12, 13. NEGLIGENCE. RAILROADS, 5–11. STREET AND INTERURBAN RAILWAYS.

PERSONAL LIABILITY. See EXECUTORS, 6, 7. MECHANICS' LIENS, 8, 10. MORTGAGES, 3.

PERSONAL OBLIGATIONS. See DEEDS, 1, 2.

PERSONAL PROPERTY. See CARRIERS, 3–6. DIVORCE, 1–4. EXECUTORS, 1–5. FRAUDULENT CONVEYANCES, 3–6. INSURANCE, 12. SALES. TRUSTS, 2. WILLS, 9, 10.

PHYSICIANS AND SURGEONS.

See CONTRACTS, 5, 6. EVIDENCE, 4.

The acquittal of a physician, in a criminal action, of the charge of having performed an abortion is no bar to a subsequent civil proceeding under secs. 1436*e*, 1436*f*, Stats., to revoke, on the same charge, his license to practice medicine. The fact that under sec. 1435*i* revocation of his license would have followed a conviction in the criminal action does not change from civil to criminal the nature of the proceeding under secs. 1436*e*, 1436*f*. *State v. Lewis*, 363

PLACE OF TRIAL. See COURTS, 5. PARENT AND CHILD, 2, 3.

PLATTING LANDS.

1. Where the original of a plat is not produced, it must be assumed that it was in accordance with the record thereof. *Superior v. Northwestern Fuel Co.* 631
2. Even though the makers of a plat, which was certified and acknowledged by the owners and duly filed for record, did not comply with secs. 2260–2264, R. S. 1878, in that the map does not show on its face the center lines of the streets, or that monuments were placed at the beginning and terminus of each street, or the material of which such monuments were constructed, and the respective ownerships are not properly indicated thereon, yet, there being a legend upon the map which describes in detail the lands platted, the courses and distances of the boundaries, the size and location of the lots, the manner in which the beginnings and termini of the streets were indicated, the location of monuments, the dimensions and locations of alleys, and the material of which monuments were constructed,—so that every material fact required by statute to be exhibited upon the map can be definitely ascertained and located; and the certificate of the surveyor being full and complete and stating that he had fully complied with the law in surveying, subdividing, and mapping the premises, it is *held* that the map, the legend, and the certificate of the surveyor taken together constitute a substantial compliance with the statutory requirements and show a statutory dedication of the streets. *Ibid.*
3. It appearing from such map and legend that the plattors intended to extend Superior street (afterwards called Hill avenue) in the city of Superior northerly to the shore of the St. Louis river (Bay of Superior), such street was thereby dedicated to the public use accordingly and the public became vested with the right to pass over a strip of the submerged land lying between the shore line at the end of the street and the dock line established by the United States, such strip being bounded by lines drawn from the thread of the stream and at right angles therewith to the points where the boundaries of the street intersect the shore line of the river. *Ibid.*
4. It appearing that the city of Superior never used or occupied the northerly end of said street and that the same had never been opened for public travel; that the city accepted a later plat upon which the strip above mentioned was not shown as a street but with other submerged lands lying between the shore line and the dock line was included within block lines; that the defendant purchased said strip and adjoining lands in accordance with the

later plat and in reliance thereon and proceeded to make extensive and valuable improvements thereon, including a large coal dock costing several hundred thousand dollars; that the city made no objection, but on the contrary recognized defendant's ownership of the lands and taxed them accordingly; and that the opening of a public way through the property would greatly damage defendant's plant and permanently impair its usefulness,—it is *held* that the city is estopped from asserting any claim or interest in the premises owned by defendant on account of any rights which the city or the public acquired by the extension of Superior street to the shore line of the river, as shown in the first plat. *Ibid.*

5. The fact that the parties to the action made a stipulation to the effect that if the claim of the city should be upheld it should be entitled, in lieu of its rights over the strip mentioned, to similar rights over another strip, cannot be considered in determining the issues in the case, since such determination must be based upon the facts as they existed when the action was begun. *Ibid.*

PLEADING.

Complaint: Exhibits made part thereof.

Where a copy of a contract is annexed to a complaint which states that it is so annexed and is "made a part of this complaint," such contract is a part of the pleading and may properly be resorted to in determining its sufficiency. *Sedgwick v. Blanchard,* 421

Same: Construction. See ELECTIONS, 11.

Same: Joinder of causes of action. See FRAUD, 2.

Answer: Statute of limitations. See LIMITATION OF ACTIONS, 1.

Counterclaim. See COSTS, 2, 3.

Amendment. See NEGLIGENCE, 8.

Striking out matter. See APPEAL, 1.

Variance. See BILLS AND NOTES, 1.

In criminal actions. See INDICTMENT AND INFORMATION. RECEIVING STOLEN GOODS, 1, 3.

POISONS.

See NEGLIGENCE, 1.

Sec. 1419, Stats., regulating the sale of poisonous drugs and chemicals and requiring that packages containing them be labeled "poison," does not apply to the sale of articles of merchandise, such as phosphorous matches, in which some poisonous drug or chemical may have been used. *Stasek v. Banner Coffee Co.* 538

POLICE POWER. See CONSTITUTIONAL LAW, 2, 3. FRAUDULENT CONVEYANCES. MUNICIPAL CORPORATIONS, 3.

POSITIVE AND NEGATIVE TESTIMONY. See RAILROADS, 6.

POSSESSION.
Of land. See EJECTMENT. EVIDENCE, 6. PARTNERSHIP.
Of personal property. See CARRIERS, 3–5.

PRACTICE: Mistakes, omissions, amendments, etc. See COURTS, 9. MILLS AND MILLDAMS, 4.

PREMIUMS: Extension of credit. See INSURANCE, 1–11.

PRESCRIPTION: Easements. See NAVIGABLE WATERS, 7-9.

PRESENTMENT FOR PAYMENT. See BILLS AND NOTES, 5.

PRESUMPTIONS. See APPEAL, 8-10. EVIDENCE, 1. FRAUDULENT CONVEYANCES, 3. HIGHWAYS, 15. INSURANCE, 3. PLATTING LANDS, 1.

PRINCIPAL AND AGENT. See ACCORD AND SATISFACTION, 3. MASTER AND SERVANT, 16. PUBLIC UTILITIES, 8. TRUSTS AND TRUSTEES, 4, 5.

PRINCIPAL AND SURETY.

Assumption of debts by surety: Evidence.

1. A finding by the jury that the defendant surety company promised to assume and pay the debts of one R. upon conveyance to it of all his property to protect it on its liability on its bond as surety, is *held* to be sustained by the evidence. *Lauerman Bros. Co. v. National Surety Co.* 357

Bond construed: "Obligations:" "Indebtedness."

2. Promissory notes given by the buyer pursuant to a contract for the purchase of goods were "obligations" arising out of the contract, and the amount due on them was "indebtedness arising out of" the contract, within the meaning of a bond given to secure payment of such obligations and indebtedness. *Milwaukee County v. Illinois Surety Co.* 259

Discharge of surety: Variation from contract: Advance payments.

3. Where the performance of a contract is guaranteed by a surety, any material, substantial, and prejudicial variation of its terms will discharge the surety. *Lloyd Inv. Co. v. Illinois S. Co.* 282
4. Advance payments not provided for in the contract, while they constitute a variation of its terms, will not discharge the surety if it affirmatively appears that under all the circumstances the departure from the agreement was immaterial and nonprejudicial. *Ibid.*
5. A building contract which provided for payment of $5,000 on or before completion of the mason work, to be made by delivery of the owner's promissory note payable on or before a specified date, and for a payment of $5,000 when the first-floor stores were ready for occupancy, also to be made by delivery of a promissory note "made, executed and dated on or before the time when said first-floor stores are ready" and payable on or before a specified date, and in which the contractor further agreed to accept payment of said notes and of the final amount ($3,000) due on the contract in notes payable $500 every three months, is construed as permitting the owner to give the two $5,000 notes in negotiable form, and the giving of them in such form was therefore not such an advance payment as would discharge a surety; nor was the giving of the second note a short time before the first-floor stores were ready for occupancy a material or prejudicial departure from the contract. *Ibid.*
6. The owner having given the two $5,000 notes in negotiable form, they were negotiated by the contractor, and when they became due the owner gave a new $10,000 note to take them up. *Held* that, the contractor having rendered himself incapable of taking new securities in payment of the $5,000 notes as he had agreed, the giving of the new note was not an election by the owner to pay those notes in cash rather than in new securities. *Ibid.*

Same: Final settlement: Evidence.

7. Whether, at the time the contractor gave a receipt "for payment of balance due under the contract and for extras," a complete settlement of all matters relating to the contract was made, thereby discharging the surety, was a question which, under the evidence, it was not clearly error to submit to the jury. *Lloyd Inv. Co. v. Illinois S. Co.* 282

8. The rejection of evidence offered on behalf of the surety as to a conversation between the contractor and the president of the owner regarding extras, was not a prejudicial error, there being no recovery or basis for a recovery for extras, and it not being probable that the reception of such evidence would have changed the finding of the jury on the question of settlement. *Ibid.*

PRIVITY. See CONTRACTS, 1–4. INSURANCE, 14.

PRIZE FIGHT: Violation of rules. See CONTRACTS, 15.

PROBATE. See COURTS, 8, 9. WILLS, 1–3.

PROMISSORY NOTES. See BILLS AND NOTES.

PROOFS OF LOSS. See INSTRUCTIONS TO JURY, 2. INSURANCE, 13.

PROXIMATE CAUSE. See APPEAL, 18. CARRIERS, 7. MASTER AND SERVANT, 16. NEGLIGENCE, 2, 6.

PUBLIC BUILDINGS. See MECHANICS' LIENS, 1–3.

PUBLIC IMPROVEMENTS. See HIGHWAYS AND BRIDGES.

PUBLIC POLICY. See CORPORATIONS, 6–9. COURTS. DIVORCE, 7. HIGHWAYS AND BRIDGES, 1, 10. NAVIGABLE WATERS, 2.

PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE. See MILLS AND MILLDAMS, 3.

PUBLIC UTILITIES.

Indeterminate permit: Acceptance: Effect.

1. The acceptance, by a public utility, of an indeterminate permit under sec. 1797*m*—78, Stats. (Laws 1907, ch. 499), amounted to a perpetual waiver of a verdict of necessity, as required by sec. 2, art. XI, Const., and a consent that proceedings to acquire its property might be initiated at any time by the municipality and that its property might be acquired in the particular manner prescribed by the act. *Connell v. Kaukauna,* 471

Acquirement by city: Purchase: Condemnation: Notice to lienholders: Trustee for bondholders.

2. A proceeding by a city to acquire the property of a public utility under sub. 4, sec. 1797*m*—79, Stats. (Laws 1907, ch. 499), though denominated a purchase and although in some aspects the rights of the parties were contractual, was in the nature of a condemnation proceeding and its effect is to be determined in accordance with the laws governing the exercise of the power of eminent domain. *Connell v. Kaukauna,* 471

3. Such a proceeding may be sustained as one in the nature of a condemnation proceeding, although the statute did not require that notice be given to the holders of liens upon the property to be acquired; and it was not essential to the validity of the statute that it should contain such requirement. *Davis v. La C. & M. R. Co.* 12 Wis. 16, and other cases, distinguished and limited. *Ibid.*

4. Formal notice of such a proceeding to the trustee under a trust deed of the property to be acquired is sufficient to bind the holders of the bonds secured by such deed. *Ibid.*

[5. Whether the public character of the hearing before the railroad commission, provided for in sec. 1797*m*—82, Stats. (Laws 1907, ch. 499), together with the right of review given to bondholders, etc., by sec. 1797*m*—83, as amended by ch. 662, Laws 1911, constituted sufficient notice to bind all bondholders by the determination of the commission, is not determined.] *Ibid.*

6. In such a proceeding, formal notice of the hearing before the railroad commission was given to the utility but not to a trust company to which a trust deed of the property, securing bonds, had been given. The president and managing officer of the trust company, who was also the owner or in control of practically all the capital stock of the utility, directed the prosecution of an appeal from the order of the commission. Although he was not an officer of the utility, the attorneys who acted under his direction entered their appearance in its behalf. *Held* that, since the trust company and the utility were not separate in interest and were under the same management and control, the trust company, and through it the bondholders, had actual notice of the proceeding and were bound by the judgment affirming the award of the commission. *Ibid.*

Same: Lien of mortgage extends to award. See MORTGAGES, 1.

Same: Payment of award: Receipt by trustee for bondholders: Agency: Authority: Foreclosure of trust deed.

7. A city which had notice of a trust deed of the property of a public utility which it was acquiring by condemnation, was bound to see that the amount of the award (which was less than the amount of the bonds secured by said deed) was applied to the satisfaction of the claims of the bondholders; and it could not discharge that obligation by turning the money over to the utility corporation, then insolvent. *Connell v. Kaukauna,* 471

8. Where a trust company to which a trust deed securing bonds had been given was the general agent, for investment purposes, of some of the bondholders, with power to accept payment of their bonds, the receipt by such trust company, even before maturity of the bonds, of a part of the award made upon condemnation by a city of the property covered by said trust deed, constituted a payment to said bondholders of their share of the award to the extent of their *pro rata* share of the sum so received; but as to other bondholders, for whom the trust company was not such agent, the receipt of the money by it was not a payment and did not affect their right to their *pro rata* share of the award. *Ibid.*

9. The trust deed in such case being for the *pro rata* benefit of all bondholders, and the award being less than the amount of the outstanding bonds, each bondholder became entitled to receive his *pro rata* share thereof. *Ibid.*

10. Where in such case, after the trustee named in the trust deed had received the greater part of the award prior to the maturity of the bonds and had so misapplied it that as to some of the bondholders there had been no payment, the successor of such trustee demanded from the city the balance remaining after satisfying a prior lien from a part of the award retained by the city for that purpose, such demand did not constitute an election of rem-

edies or a waiver of any other rights which such successor might assert as representative of the bondholders whose claim to the award had not been satisfied. *Ibid.*

11. Nor was such successor trustee barred by laches or estopped from claiming a foreclosure of the trust deed on behalf of said bondholders—who had no actual notice of the condemnation proceeding at the time of the payment, before the bonds were due, to the original trustee—by the fact that, after they became chargeable with notice of the facts by reason of default in the payment of their interest, they permitted the city, without objection or notice of adverse claim, to expend a large sum in betterments of the property. *Ibid.*

PUBLIC WORKS: Hours of labor. See CONSTITUTIONAL LAW, 1, 2. MUNICIPAL CORPORATIONS, 4–10.

QUESTIONS FOR JURY. See TRIAL.

QUIETING TITLE. See DIVORCE, 6.

QUITCLAIM DEED. See TAXATION, 6.

QUO WARRANTO. See ELECTIONS, 13.

RAILROAD COMMISSION. See NAVIGABLE WATERS, 2–5. PUBLIC UTILITIES, 5, 6. RAILROADS, 1.

RAILROADS.

Viaducts: Erection and maintenance.

1. Ch. 51, Laws 1878, requiring the defendant railway company to erect and maintain a certain viaduct or bridge in Milwaukee county carrying a highway over its tracks, was not repealed by sec. 1797—12*e*, Stats. (Laws 1909, ch. 540), relating to railroad highway crossings, nor by sec. 2 of said ch. 540, expressly repealing conflicting acts,—the act of 1878 not conflicting in any way with the act of 1909 or with the exclusive exercise of the jurisdiction conferred by the latter act upon the railroad commission. *State ex rel. Boddenhagen v. C., M. & St. P. R. Co.* 304

[2. Whether upon the passage of ch. 51, Laws 1878, a cause of action accrued in favor of Milwaukee county and every member of the public affected thereby against the defendant to compel the maintenance of the viaduct after its erection, which cause of action, since it existed prior to the passage of ch. 540, Laws 1909, could not be abrogated even if said ch. 540 operated to repeal the act of 1878, is not decided.] *Ibid.*

3. The defendant railway company being required by ch. 51, Laws 1878, to "erect and maintain" the viaduct in question, the fact that it was wrongfully broken down by the negligence of a person who ran a steam shovel over it is immaterial so far as the duty of defendant to maintain it is concerned. *Ibid.*

4. The word "maintain," with reference to a viaduct, includes keeping up, preserving, and rebuilding in case of destruction. *Ibid.*

Railroads as carriers. See CARRIERS.

Car-service rules: Demurrage. See CARRIERS, 2.

Injuries to employees. See MASTER AND SERVANT, 17–19.

Injuries to persons at crossings: Warning signals: Evidence.

5. In an action against a railway company for injuries sustained in a collision at a highway crossing the evidence is *held* to sustain findings by the jury that the bell on the engine was not rung or the whistle blown as required by law. *Kaufmann v. Chicago, M. & St. P. R. Co.* 359

6. Testimony that they heard no bell or whistle, given by witnesses who, knowing that a train was due, were listening for it, is not merely negative. *Ibid.*

7. It cannot be said as a matter of law that two men riding in an automobile driven at low speed down a slight grade are in such a position that they cannot hear the whistle and bell of an approaching train at a distance of eighty rods. *Ibid.*

8. Plaintiff was not guilty of gross negligence in failing to apply his emergency brake or in failing to adopt other possible means of escape from a dangerous situation created by the negligence of the defendant. *Ibid.*

Same: Flagman: Duty to look and listen.

9. In an action for injuries to a person who was struck by an engine at a railway street crossing in a city, if the speed of the engine did not exceed that prescribed by sec. 1809, Stats., and the only negligence on the part of the defendant railway company was the failure of the flagman to give reasonable warning, a lack of ordinary care on the part of plaintiff is a complete defense. *Waterson v. Chicago, M. & St. P. R. Co.* 375

10. The rule requiring a traveler on a highway, when he approaches a railway track, to look and listen at the last opportunity before entering the zone of danger does not apply to its full extent where an affirmative invitation to cross is given by the railway company. *Ibid.*

11. As plaintiff approached, at night, the place where a city street crossed three railway tracks he saw the gates were up, with lighted lanterns hanging on them as if they were in use. Freight cars were standing on the first track, and as he passed these he looked in both directions but did not see or hear anything approaching. As he was crossing the third track he was struck by an engine which was running backwards. The gates were, in fact, not in operation, and a flagman stationed at the crossing gave no warning until plaintiff was very close to the third track. *Held*, that it was a jury question whether plaintiff was negligent in not continuing to look until he had crossed all the tracks. *Ibid.*

Same: Unlawful speed: Injury to property: Slight negligence. See APPEAL, 10.

RATIFICATION. See CORPORATIONS, 5.

REAL-ESTATE BROKERS. See FRAUD, 2–5.

REAL PROPERTY. See APPEAL, 17. COURTS, 8. DEEDS. DIVORCE. EJECTMENT. EVIDENCE, 6. EXECUTORS, 6, 7. FRAUD, 2–5. FRAUDULENT CONVEYANCES, 1, 2. HIGHWAYS AND BRIDGES, 4, 12–15. HOMESTEAD. JUDGMENT, 4–6. MECHANICS' LIENS. MILLS AND MILLDAMS. MORTGAGES. NAVIGABLE WATERS. NUISANCES. PARTNERSHIP. PLATTING LANDS. PUBLIC UTILITIES. TAXATION, 4, 6, 7. TRUSTS, 1–5. VENDOR AND PURCHASER. WILLS, 4–8.

RECEIVING STOLEN GOODS.

See INDICTMENT AND INFORMATION.

1. Sec. 4417, Stats. 1915, includes two substantive offenses, that of knowingly receiving stolen goods and that of concealing goods known, at the time of concealment, to have been stolen. Such offenses, when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense; and a verdict finding defendant guilty of one of such offenses is a valid verdict. *Huotte v. State*, 354
2. It having been stipulated at the trial that the value of the goods in question exceeded $20, the proof having shown that fact, and no request to charge on the subject of value having been made by defendant's counsel, an objection that there was no finding that the value of the goods concealed exceeded $20 has no force. *Ibid.*
3. Where the information charged that on December 14th defendant received and aided in the concealment of stolen goods, and the proof showed that they were received on the 14th but the concealment with knowledge that they were stolen did not take place until the last of the month, there was no fatal variance, it being sufficient that the date proved corresponds substantially with the charge. *Ibid.*

RECOUNT of ballots. See ELECTIONS, 13–15.

REFORMATION OF INSTRUMENTS.

1. In an action to reform a contract by which defendant sold to plaintiffs his interest in a partnership between him and one of them, a finding of the trial court that the consideration for such sale was to be the amount defendant had actually invested in the business, and that through a mutual mistake of fact such amount was overstated, is *held* to be sustained by the evidence. *Ficks v. Purcell*, 596
2. Payments made by plaintiffs to the defendant after their discovery of the mistake did not, under the circumstances of the case, operate as an estoppel or waiver of the right of defendant's former partner to recover the amount overpaid. *Ibid.*
3. A further finding in such case that a note for $500 given by defendant to his former partner was given as security for the bad debts of the partnership and not as a reduction of the amount paid to defendant for his interest, is also *held* to be sustained by the evidence. *Ibid.*

REMEDIES. See COURTS, 4, 8–10. MILLS AND MILLDAMS, 3, 4. MECHANICS' LIENS, 7–10. TRUSTS AND TRUSTEES, 8.

REMOVAL FROM OFFICE: Circuit judge. See JUDGES.

REPEAL of statute. See STATUTES, 7, 8.

RESCISSION. See CONTRACTS, 11–14. CORPORATIONS, 7, 10, 11.

RESERVOIR DAMS. See NAVIGABLE WATERS.

RES GESTÆ. See EVIDENCE, 2.

RESIDENCE of elector. See ELECTIONS, 5–12.

RES JUDICATA. See JUDGMENT, 1–3. NEGLIGENCE, 8.

RESTRAINT OF TRADE, etc. See CONTRACTS, 5, 6. MASTER AND SERVANT, 5.

REVISERS' NOTES. See STATUTES, 6.

REVIVAL of action. See ABATEMENT AND REVIVAL.

RIGHT OF WAY over streets: Fire patrol. See MUNICIPAL CORPORATIONS, 1–3.

RIPARIAN RIGHTS. See NAVIGABLE WATERS. PLATTING LANDS, 3–5.

RIVERS. See MILLS AND MILLDAMS. NAVIGABLE WATERS. PLATTING LANDS, 3–5.

ROADS AND STREETS. See AUTOMOBILES. HIGHWAYS AND BRIDGES. MUNICIPAL CORPORATIONS, 1–3, 11–13. PLATTING LANDS. RAILROADS.

SAFETY of working place, etc. See MASTER AND SERVANT, 11–17.

SALES.

Bond given by sellers: Construction: Warranties, express and implied.

1. In a bond given by the sellers of cheese to protect the buyer against claims of third persons, recitals as to an agreement made by said buyer with "all persons interested in the ownership of said cheese" that he would purchase the same if said persons would indemnify him against any judgment recovered by any other claimant, together with the fact that the sellers received from him the full market and purchase price of the cheese, are *held* to constitute an affirmation and an express warranty of ownership, under sec. 1684*t*—12, Stats. *Kirkpatrick v. Kepler*, 558
2. There being nothing in the circumstances of the sale itself or in the language of the bond to indicate a contrary intention, there was, under sub. (1), sec. 1684*t*—13, Stats., an implied warranty of right to sell the cheese, even though it was not at the time in the possession of the sellers. *Ibid.*
3. The very purpose of the bond being to secure the buyer against the claims of certain persons known to both parties, it cannot be construed as showing any "contrary intention" to an implied warranty, and the sellers are not relieved from liability by sub. (3), sec. 1684*t*—13, Stats. *Ibid.*
4. The agreement for the sale itself being oral and separate and distinct from the bond, the rule is not applicable that where there is a written contract of sale with an express warranty, other than such warranty as the law implies, no other or different warranty can be proven by parol. *Ibid.*

When title passes: Stoppage in transitu. See CARRIERS, 3–5.

Rescission. See INFANTS, 1, 2.

Sale of corporate stock: Conditions. See BILLS AND NOTES, 1–4.

Same: Invalidity: Consideration. See CORPORATIONS, 6–9.

Sale of contract: False representations. See FRAUD, 1.

Sale of stock of goods in bulk. See FRAUDULENT CONVEYANCES, 3–6.

Sale of poisons. See POISONS.

Action for breach: Failure to deliver automobile: Evidence.

5. In an action to recover the amount paid on the purchase price of an automobile which plaintiff claimed the defendant had failed to deliver on ten days' notice, as provided in the contract, a general verdict for defendant is *held* to be sustained by evidence tending to show, among other things, that the contract had been modified so as to call for a different model of car; that

plaintiff afterwards demanded the model originally contracted for, the manufacture of which had been discontinued; that defendant was then unable to procure that car within ten days, but afterwards procured and offered one to plaintiff, who refused it; and that the contract provided that all dates of delivery were made without liability on defendant's part for delays from causes beyond his control. *Cotzhausen v. Rockstead,* 292

SALES OF LAND.
By contract. See VENDOR AND PURCHASER.
Through brokers. See FRAUD, 2–5.
Under foreclosure judgment. See MORTGAGES, 2–6.
For taxes. See TAXATION, 7.

SCHOOLS AND SCHOOL DISTRICTS.

Altering boundaries of district. See COURTS, 3, 4.

Borrowing money for schoolhouse.

1. Sec. 475, Stats. 1915,—providing that any school district may, by vote of the electors, authorize the borrowing of money for the purpose of aiding in the erection or purchasing of a schoolhouse,—should be liberally construed to effectuate its purpose. *Cotter v. Joint School Dist.* 13
2. The borrowing of $12,000 "for the purpose of remodeling" a schoolhouse "and erecting an addition thereto" was for the purpose of aiding in the "erection" thereof, within the meaning of sec. 475. *Ibid.*
3. Where the electors of a school district adopted a resolution authorizing the district board to apply for a loan from the state trust funds or some other source, the failure to specify therein the manner of payment, as required by sec. 475, Stats. 1915, did not invalidate the resolution, such omission being supplied by secs. 258*a*—1 and 261, so as to leave no uncertainty. *Ibid.*
4. The words "or some other source," in such resolution, may be treated as surplusage. *Ibid.*
5. Such a resolution was not invalidated by the fact that it provided for an interest rate of four and one-half per cent., while the statute provides for only four per cent. on trust funds, since the lower rate is advantageous to the district. *Ibid.*

SETOFF of damages. See COSTS, 2, 3.

SETTLEMENT. See ACCORD AND SATISFACTION. PRINCIPAL AND SURETY, 7.

SLANDER. See LIBEL AND SLANDER.

SPECIAL PROCEEDINGS. See ABATEMENT AND REVIVAL, 1.

SPECIAL VERDICT. See MASTER AND SERVANT, 13. NEGLIGENCE, 6.

SPECIFIC PERFORMANCE. See ADOPTION. CONTRACTS, 1–3.

SPEED.
Of automobiles. See AUTOMOBILES, 3, 4.
Of trains. See APPEAL, 10. RAILROADS, 9.

STATE AND COUNTY AID. See HIGHWAYS AND BRIDGES, 1–10.

STATE AND FEDERAL STATUTES. See MASTER AND SERVANT, 17.

STATES.
Limiting hours of labor on public buildings, etc. See CONSTITUTIONAL LAW, 1, 2.
Enforcement of judgment rendered in another state: State policy. See DIVORCE, 5–7.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. COURTS, 1, 10. ELECTIONS, 1. FRAUDULENT CONVEYANCES, 3. HIGHWAYS AND BRIDGES, 6–10. JUDGES. NUISANCES, 2. TAXATION, 11.

1. An unconstitutional act of the legislature is not a law; it confers no rights, it imposes no penalties, it affords no protection, it is not operative, and in legal contemplation it has no existence. *State ex rel. Kleist v. Donald,* 545

Construction. See ANIMALS. APPEAL, 2, 7, 10, 25. AUTOMOBILES, 3. BUILDING AND LOAN ASSOCIATIONS. CARRIERS, 1, 2. CONSTITUTIONAL LAW, 3. CORPORATIONS, 3, 6, 8, 11. COSTS, 1–3. COURTS, 6, 7, 9. DISMISSAL AND NONSUIT, 1. DIVORCE, 1–4. ELECTIONS, 5–15. ELECTRICITY, 2. EVIDENCE, 5–7. EXECUTORS, 2. FRAUDULENT CONVEYANCES, 2–6. HIGHWAYS AND BRIDGES, 1–15. HOMESTEAD. INDICTMENT AND INFORMATION. INSURANCE, 12. JUDGES. JUDGMENT, 4–6. LIMITATION OF ACTIONS, 2. MANDAMUS, 4. MASTER AND SERVANT, 7–9. MECHANICS' LIENS, 1–7. MILLS AND MILL-DAMS. MORTGAGES, 2, 4, 6. MUNICIPAL CORPORATIONS, 3, 6–10. NAVIGABLE WATERS, 1–5. NUISANCES. OFFICERS, 2. PARENT AND CHILD. PARTIES. PARTNERSHIP. PLATTING LANDS, 2. POISONS. PUBLIC UTILITIES, 1–6. RAILROADS, 1–4, 9. RECEIVING STOLEN GOODS, 1. SALES, 1–4. SCHOOLS. TAXATION. TOWNS. WEIGHTS AND MEASURES. WORKMEN'S COMPENSATION.

2. In construing a statute the legislative purpose must prevail so far as it can be gathered from the language of the law by any reasonable construction. *Pfingsten v. Pfingsten,* 308
3. When the literal meaning of a statute, though apparently plain and unambiguous, is absurd or unreasonable, ambiguity arises, the presumption being that such literal meaning does not correctly voice the legislative purpose. *Ibid.*
4. When ambiguity or obscurity exists in a statute, the court may look to its history, to all the circumstances intended to be dealt with, to the evils to be remedied, to its reason and spirit, to every part of the enactment, and may reject words or read words in place which seem to be there by necessary or reasonable inference, and substitute the right word for one clearly wrong, and so find the real legislative intent, though it be out of harmony with or even contradict the letter of the act. *Ibid.*
5. A thing which is within the intention of the lawmakers and by rules of construction can be read out of it, is as much within the statute as if it were there within the letter. *Ibid.*
6. In construing a statute the revisers' notes may properly be referred to in determining the legislative intent. *Ibid.*

Permissive and directory statutes. See DISMISSAL. TAXATION, 5.

Amendment, revision, etc. See DIVORCE, 3.

Repeal. See AUTOMOBILES, 3. RAILROADS, 1, 2.

7. Where there are two affirmative statutes on the same subject, one will not repeal the other if both can stand together. *State ex rel. Boddenhagen v. C., M. & St. P. R. Co.* 304
8. Although repeals by implication are not favored, and acts directed to a special subject are generally to be given effect rather than a general act, yet where the legislative intent to make the general act controlling is apparent, it will be given that effect. *Chippewa & F. Imp. Co. v. Railroad Comm.* 105

State and federal statutes. See MASTER AND SERVANT, 17.

Pleading. See LIMITATION OF ACTIONS, 1.

STAY OF PROCEEDINGS. See APPEAL, 6, 7.

STIPULATIONS. See DISMISSAL AND NONSUIT, 2. PLATTING LANDS, 5. RECEIVING STOLEN GOODS, 2.

STOCK AND STOCKHOLDERS. See CORPORATIONS.

STOLEN GOODS. See INDICTMENT AND INFORMATION. RECEIVING STOLEN GOODS.

STOPPAGE IN TRANSITU. See CARRIERS, 4, 5.

STREET AND INTERURBAN RAILWAYS.

Injuries to passengers. See CARRIERS, 8–11.

Injury to person working on tracks: Lookout for cars.

1. It is the duty of the ordinary traveler on a street to keep a vigilant lookout for approaching street cars; but a person who is lawfully performing work upon the street and the tracks of a street railway company with its knowledge, consent, or procurement is not bound to keep the same lookout as the ordinary traveler and may assume that the customary precautions will be taken by the company and the customary warnings given. *Dinan v. Chicago & M. E. R. Co.* 295

Injury to traveler on highway: Horses beyond control: Duty of motorman.

2. If the motorman of an electric car observes, or in the exercise of ordinary care should observe, a person with his team in the zone of danger from such car, or liable to enter such zone, and that the horses are not under control, it is the duty of such motorman to exercise ordinary care to prevent a collision. *Scheuer v. Manitowoc & N. T. Co.* 333
3. Findings by the jury in this case that plaintiff's horses were beyond his control from the time they left the concrete way, which was parallel with defendant's interurban railway within the limits of the highway, until they were struck by a car, and that the motorman knew that fact in time to have prevented the collision by slowing or stopping the car, are *held* to have support in the credible evidence. *Ibid.*

Same: Evidence: Special verdict: Instructions to jury.

4. It was not error to refuse to permit defendant to show, on cross-examination of plaintiff, that he asked, a half hour or so after the accident, if the motorman could not have stopped the car quicker; nor to refuse to permit him to state whether he did not make up his mind at the time of the accident that his injuries were the result of the motorman's negligence. *Scheuer v. Manitowoc & N. T. Co.* 333
5. The error, if any, in submitting to the jury the question whether, at the time the motorman set the brakes, the car was being run at a negligent rate of speed under the existing circumstances, was not prejudicial, it appearing that the result of the trial would have been the same if the question had been omitted from the special verdict. *Ibid.*
6. In an action for injuries to person and property caused by an electric car colliding with plaintiff's team, instructions to the jury as to the question whether the horses were beyond plaintiff's control for some time prior to the accident, as to the motorman's knowledge of that fact and his negligence in failing to slow up or stop the car, and as to whether the car was going at an excessive rate of speed, are *held* to have been warranted by the evidence and not to have invaded the province of the jury. *Ibid.*

STREETS. See AUTOMOBILES. MUNICIPAL CORPORATIONS, 1–3, 11–13. PLATTING LANDS, 2, 3. RAILROADS.

STUDENTS: Residence: Right to vote. See ELECTIONS, 5–12.

SUBSCRIPTIONS for stock. See CORPORATIONS, 1–5.

SUPREME COURT. See APPEAL AND ERROR. COURTS, 1–4.

SURETYSHIP. See PRINCIPAL AND SURETY.

SURPLUSAGE. See SCHOOLS AND SCHOOL DISTRICTS, 4.

TAXATION.

Uniformity in rule of taxation. See HIGHWAYS AND BRIDGES, 10.

By whom taxes are imposed. See HIGHWAYS AND BRIDGES, 7.

Equalization by tax commission.

1. On *certiorari* to review proceedings of the tax commission in making a redetermination of the values of taxable property in the several taxing districts of a county, following an appeal regularly brought from the assessment by the county board, a decision of the court that such proceedings were void for failure to comply with the statutes did not divest the commission of jurisdiction of the appeal; and the situation thereafter was as though the commission had never attempted to act thereon. *State ex rel. Baker v. Haugen,* 443
2. An order of the tax commission reciting that a preliminary hearing on such appeal was adjourned from the 10th to the 21st of September was sufficient, in the absence of anything in the record to the contrary, to show that the hearing was so adjourned, and the fact that the order was dated on September 21st, together with the recital therein, was sufficient to show that it was made at the hearing on that date. *Ibid.*
3. Where such order provided "that the appeal . . . be and the same is hereby entertained and that a review and redetermination of the relative value of the taxable property of the several assessment districts of said county be granted . . . ; that such a review be made . . . and that the same extend to all towns, cities, and villages in said county and to all the taxable property therein . . . ," there was a sufficient compliance with the requirements of sec. 1077*f*, Stats., that the commission shall, at the preliminary hearing or an adjournment thereof, determine whether the appeal should be entertained or dismissed, and shall make up the issues between the parties. *Ibid.*
4. Under secs. 1077*a* to 1077*l*, Stats., the tax commission has very broad powers in respect to ascertaining the value of the different kinds of property in the taxing districts. Statistics of recorded sales of real estate and of the assessed valuation of lands included in such sales, collected and compiled pursuant to secs. 1007–1009, Stats., and all other information provided for by statutes respecting valuations of property, may be used by the commission in the performance of its duties; and expert knowledge acquired by it may be applied to the facts in evidence in reaching its determination. *Ibid.*
5. Sec. 1077*c*, Stats. (requiring an appeal from the determination of the county board to be taken within four months); sec. 1077*d* (requiring the county clerk "without delay" to prepare and forward certain matter to the commission); and sec. 1077*f* (requiring the tax commission to make its final decision within four months from the making up of the issues upon preliminary hearing) are directory; and a failure of the commission to de-

termine the matter speedily, especially where such delay is occasioned by legal proceedings, does not divest the commission of jurisdiction. *Ibid.*

Refund of excessive taxes. See MANDAMUS, 4, 5.

Conveyance of land: When grantor to pay tax.

6. Under sec. 1153, Stats. 1898, where land was conveyed (in this case by quitclaim deed) after the date of the tax warrant, it was the duty of the grantor to pay the taxes assessed before the conveyance, if there was no express agreement to the contrary. *Baldwin v. Barber,* 622

Tax title: Who may acquire.

7. One cannot acquire a valid tax title founded upon a sale for taxes which it was his duty, either legally or equitably, to pay, and enforce it as against any person who would be prejudiced by his neglect. *Baldwin v. Barber,* 622

Taxation of incomes: Nonresident: Dividends, etc., received by resident trustee.

8. The word "income" as used in sec. 1, art. VIII, Const., means the profit or gain derived from capital or labor or from both combined. *State ex rel. Wis. Trust Co. v. Widule,* 56

9. Under secs. 1087*m*—2, 1087*m*—10, Stats. 1913, dividends derived from stocks and interest derived from notes, mortgages, etc., received by a resident trustee (individual or corporate) as a gain or profit from securities constituting the trust fund were taxable as income in this state, even though the person entitled to the enjoyment thereof and to whom they must be paid over was a nonresident and also a co-trustee, and even though two of the three trustees resided without the state. *Ibid.*

10. The resident trustee, in such a case, in whose custody the securities were and to whom the dividends and interest were paid, must, in view of sub. 5, sec. 1087*m*—10, be deemed the "recipient" of such income, within the meaning of sub. 3, sec. 1087*m*—2. *Ibid.*

11. The taxation of such income in this state is within the constitutional power of the legislature, and no contract obligation is thereby impaired. *Ibid.*

TAX COMMISSION: Equalization: Procedure. See TAXATION, 1–5.

TAXPAYERS' ACTION. See OFFICERS, 3.

TAX TITLES. See TAXATION, 7.

TENDER OF DEFENSE. See JUDGMENT, 1, 2.

TERMINATION. See CONTRACTS, 11–14. MASTER AND SERVANT, 4–6. PARTNERSHIP.

TITLE.

To land. See COURTS, 8. DEEDS. DIVORCE. EJECTMENT. EVIDENCE, 6. HOMESTEAD. NAVIGABLE WATERS, 6–9. PLATTING LANDS. TAXATION, 7. VENDOR AND PURCHASER. WILLS, 4–8.

To personal property. See CARRIERS, 3–5. EXECUTORS, 3, 5. SALES.

TORTS. See APPEAL, 10, 18. AUTOMOBILES. BANKRUPTCY. CARRIERS, 6–11. COSTS, 1–3. DAMAGES. ELECTRICITY. FRAUD. HIGHWAYS, 16–18. INFANTS, 3, 4. LIBEL AND SLANDER. MASTER AND SERVANT, 10–19. MUNICIPAL CORPORATIONS, 12, 13. NEGLIGENCE. RAILROADS, 5–11. STREET AND INTERURBAN RAILWAYS.

TOWNS.

See HIGHWAYS AND BRIDGES.

Officers: Election and appointment: Treasurer.

1. Where an ineligible person was legally elected town treasurer his refusal, due either to inability or disinclination, to qualify for the office created a vacancy and, under sec. 818, Stats., the town board properly appointed another treasurer in his place. *State ex rel. Schommer v. Vandenberg,* 628
2. A town treasurer appointed pursuant to sec. 818, Stats., is "elected" within the meaning of that word in sec. 811, which provides that every town officer shall hold his office "until his successor is *elected* and qualified." *Ibid.*

Same: Malfeasance: Discounting bounty certificates. See OFFICERS, 2, 3.

TRANSACTIONS WITH PERSONS SINCE DECEASED. See CORPORATIONS, 11.

TRIAL.

Selection of jury. See JURY.

Reception of evidence: Reopening case.

The opening of a case after both parties had rested, for the purpose of admitting formal evidence which added nothing of substance to the case, was not a prejudicial error even though defendant's counsel was not present, no claim being made that there was anything in such evidence which he could have met or desired to meet by proof. *Columbus Institute v. Conohan,* 219

Arguments and conduct of counsel. See NEGLIGENCE, 10.

Questions for jury. See APPEAL, 12. AUTOMOBILES, 1, 2, 4. CARRIERS, 7–11. ELECTRICITY, 1. HIGHWAYS, 16–18. INFANTS, 2. INSURANCE, 4–7. MASTER AND SERVANT, 3, 12, 16. NEGLIGENCE, 4–6. PRINCIPAL AND SURETY, 7. RAILROADS, 7, 11.

Instructions to jury. See INSTRUCTIONS TO JURY.

Special verdict. See APPEAL, 18. INSTRUCTIONS TO JURY, 5, 6. MASTER AND SERVANT, 13.

Same: Matters omitted: Presumption on appeal. See APPEAL, 10.

Findings by court: Review on appeal. See APPEAL, 12–17, 19.

TRUST COMPANIES. See PUBLIC UTILITIES, 4, 6, 8–11. TRUSTS AND TRUSTEES, 3–5.

TRUST DEED. See INSURANCE, 12. TRUSTS AND TRUSTEES, 1–5.

TRUST FUNDS: Loan to school district. See SCHOOLS AND SCHOOL DISTRICTS.

TRUSTS AND TRUSTEES.

Creation and validity of trusts.

1. A certain written instrument by which the grantor transferred and conveyed to designated trustees, and to the survivor of them, all her property, real and personal, is *held* to have created a valid, active trust within the meaning of sec. 2074, Stats., for purposes authorized by sub. (5), sec. 2081, and not to have been intended merely as a testamentary disposition of the property, although some of the phraseology of the instrument might indicate the latter intention. *Pietsch v. Marshall & Ilsley Bank,* 368

Construction of trust: Equitable conversion.

[2. Whether, under the provisions of such instrument, the real estate is to be deemed personal estate for the purposes of the trust, not determined.] *Pietsch v. Marshall & Ilsley Bank,* 368

Trustees under trust deeds: Authority to represent bondholders. See PUBLIC UTILITIES, 4, 6–11.

3. Under a trust deed providing that in case of a default in payment of interest on the secured bonds the principal thereof should, at the election of the trustee, become immediately due and payable, there was no such default where the trustee advanced the money and paid the interest to the bondholders, even if it did so to conceal from them the true situation; and in any event the principal would not become due, because of a default as to interest, until the trustee in fact so elected. *Connell v. Kaukauna,* 471

4. The mere fact that bonds and interest coupons thereon were payable when due at the office of a trust company which was trustee in the trust deed securing the bonds, did not make such trustee the agent of the bondholders to receive payment. *Ibid.*

5. The authority of a trustee under a trust deed to act for the holders of the bonds secured thereby is prescribed and limited by the terms of the deed; and a payment to the trustee cannot be held to be a payment to the bondholders unless made when and as prescribed in the deed. *Ibid.*

Execution of trust: Violation: Recovery against offending trustee.

6. A trust must be executed according to the plan of its creator, and the language thereof, if not perfectly plain, must be so construed, if practicable, as to carry out the creator's intent as evidenced by all the circumstances characterizing the trust. *Will of Mendel,* 136

7. Where a will created a trust fund and directed its investment in "first class interest-bearing real-estate mortgage securities," the testator's intention was to confine the investments to mortgages wholly owned by the trustees and held by them for the sole benefit of the trust fund; and it was a violation of the trust to invest any part of the fund in mere participating certificates or bonds entitling the trustees to share with others in the mortgage security. *Ibid.*

8. For such a violation of the trust, claim may be made and a recovery had against the offending trustee for the amount wrongfully diverted from the trust fund, and the successor of such trustee may proceed upon the theory that the securities so wrongfully taken are the property of the trustee who took them but are subject to an equitable lien in favor of the trust fund to secure, so far as they will, his liability for the diversion. Such proceeding does not involve inconsistent remedies between which an election need be made. *Ibid.*

Resident trustee for nonresident: Income: Taxation. See TAXATION, 9–11.

UNIVERSITY: Right of students to vote. See ELECTIONS, 5–12.

VACANCY in office. See TOWNS.

VALUE: Evidence. See APPEAL, 17, 22. TAXATION, 4.

VARIANCE. See BILLS AND NOTES, 1. RECEIVING STOLEN GOODS, 3.

VENDOR AND PURCHASER OF LAND.

Construction of contract: Sale in gross: "More or less:" Mistake.

1. A contract for the sale, for a sum stated, of a tract of land consisting of four separate parcels, each described as containing a given number of acres "more or less,"—aggregating 120.749 acres,—is *held* to have been for a sale in gross, the circumstances being such as to show that the number of acres was referred to only for the purpose of description and that the intention was to sell and to buy all of a certain tract without regard to its exact acreage. *Pereles v. Milwaukee County,* 208
2. The fact, in such case, that the tract contained 129.031 acres, instead of 120.749, did not entitle the vendor to receive a greater sum than the price named, there being no claim of fraud and the discrepancy not being so great as to indicate gross mistake. *Ibid.*

[3. What effect should be given to the words "more or less" as used in the contract and prior correspondence, is not decided.] *Ibid.*

Completion of contract by administrator: Assumption of mortgage: Personal liability. See EXECUTORS AND ADMINISTRATORS, 6, 7.

Mechanics' liens: Priority over purchase-money mortgage. See MECHANICS' LIENS, 9, 10.

When grantor to pay taxes. See TAXATION, 6.

VENUE. See PARENT AND CHILD, 2, 3.

VERDICT. See APPEAL, 10, 18. INSTRUCTIONS TO JURY, 5, 6. MASTER AND SERVANT, 13. RECEIVING STOLEN GOODS, 1.

VERIFICATION of claims. See COUNTIES.

VESTED RIGHTS. See RAILROADS, 2.

VESTING of estates.. See WILLS, 5–8.

VETERINARY SURGEONS. See CONTRACTS, 6.

VIADUCTS. See RAILROADS, 1–4.

VILLAGES. See HIGHWAYS AND BRIDGES, 1–10.

VOTERS: Qualifications: Residence. See ELECTIONS, 5–12.

WAIVER.
- Of objections. See APPEAL, 3–5.
- Of right to arbitration. See CONTRACTS, 8.
- Of right to certificate of architect. See CONTRACTS, 10.
- Of cause of action. See DISMISSAL AND NONSUIT, 4.
- Of proofs of loss. See INSURANCE, 13.
- Of errors in selecting jury. See JURY, 2.
- Of verdict of necessity. See PUBLIC UTILITIES, 1.
- Of rights of bondholders. See PUBLIC UTILITIES, 10.
- Of right to recover overpayment. See REFORMATION OF INSTRUMENTS, 2.

WARRANTY. See SALES, 1–4.

WATERS AND WATERCOURSES. See MILLS AND MILLDAMS. NAVIGABLE WATERS. PLATTING LANDS, 2–5.

WEIGHTS AND MEASURES.

False weights: Ordinance construed.

1. The purpose of sec. 1428, Milwaukee Code of 1914,—prohibiting all use of false weights and measures and providing a penalty for each violation,—is to require the use of weights and meas-

ures which themselves correctly express their value so that recourse need be had only to such weights and measures in order to determine the correct quantity weighed or measured. *Milwaukee v. Locher & Schefrin Co.* 167

2. The use, by a buyer of metal, of an old weight marked 100 pounds on a scale where it was the equivalent of a 200-pound weight was a violation of said sec. 1428, and proof of a single instance of such use was sufficient to warrant a conviction, even though it was shown that in that instance the weight was treated as a 200-pound weight and there was no fraud or deception. *Ibid.*

WILLS.

Will or trust deed? See TRUSTS AND TRUSTEES, 1.

Probate: Jurisdiction: Residence of testator.

1. Primary jurisdiction to admit a will to probate and to grant letters testamentary vests in the county court of the county of the testator's residence at his death. *Will of Durkee,* 41
2. Where, after due notice to all parties, a county court in this state admitted a will to probate and assumed general and primary jurisdiction of the estate, it decided that the testator was a resident of that county; and such decision, never having been appealed from or reversed, settled that question so far as the parties are concerned in all subsequent actions in the courts of this state. *Ibid.*

Same: Time.

3. A will may be admitted to probate at any time after the death of the testator. *Will of Brandon,* 387

Same: Fraud: Relief. See COURTS, 8, 9.

Agreement for distribution without probate proceedings. See EXECUTORS, 4, 5.

Construction: Vesting of estates.

4. The paramount rule in construing a will is that the intention of the testator should prevail so far as that can be read out of the language used to express it. *Will of Owens,* 260
5. The law favors the early vesting of estates and, in case of uncertainty respecting the purpose intended to be expressed by a testator, a construction which will accomplish that result is to be preferred to one which will not. *Ibid.*
6. When the death of a member of a class to which property is directly devised is mentioned in a will as a contingency on the happening of which the other members are to take the share intended for the deceased, a death precedent to that of the testator will be presumed to have been intended, if nothing to the contrary clearly appears by the will. *Ibid.*
7. Thus, where a testatrix devised all of her property directly to her children "in equal parts, share and share alike, the issue surviving any deceased child to take by right of representation, and the share of any deceased child leaving no issue to revert to my other children in equal parts," she intended that the share of any child predeceasing her should go to the other children, and that those children living at the time of her death should take an absolute vested title in her property. *Will of Harrington,* 142 Wis. 447, and *Eggleston v. Swartz,* 145 Wis. 106, distinguished. *Ibid.*
8. The word "revert" as used in such will means merely "go to." *Ibid.*

Same: Legacies, when payable.

9. Where, in place of a provision in a will giving testator's married daughter an equal share with his other daughters in the homestead, a codicil substituted a legacy of $200, to be paid to her by the other heirs "after my death," such legacy was intended to become due and payable one year after testator's death, that being the time generally limited for the payment of debts and legacies. *Will of Brandon,* 387

10. Where, in such case, the other daughters had come into the use and possession of the homestead immediately after testator's death, the married daughter was entitled to interest on her legacy from the time it became due, although by agreement among the heirs the will was not probated until many years after. *Ibid.*

Same: Trust fund: Method of investment. See TRUSTS AND TRUSTEES, 6, 7.

WITNESSES.
Competency: Transactions with persons since deceased. See CORPORATIONS, 11.
Deceased or absent witnesses: Testimony given in "other action or proceeding." See EVIDENCE, 5–8.

WOMEN: Hours of labor. See CONSTITUTIONAL LAW, 3. MASTER AND SERVANT, 7.

WORDS AND PHRASES.
Accord and satisfaction. See ACCORD AND SATISFACTION, 1.
Action on judgment, in statute. See MORTGAGES, 2.
Active trust, in statute. See TRUSTS, 1.
Administrator, in statute. See EXECUTORS, 2.
After my death, in will. See WILLS, 9, 10.
Chattel mortgage, in policy. See INSURANCE, 12.
Claims, demands and sums, in statute. See COURTS, 7.
Collect and report, in instructions to agent. See INSURANCE, 5.
Contrary intention, in statute. See SALES, 3.
Contravention of the agreement, in statute. See PARTNERSHIP.
Debt. See BANKRUPTCY.
Deceased child, in will. See WILLS, 7.
Default in payment, in policy. See INSURANCE, 9.
Default in payment, in trust deed. See TRUSTS, 3.
Elected, in statute. See TOWNS, 2.
Employed, employment, in statute. See MASTER AND SERVANT, 9.
Employed in violation of law as to age, in policy. See MASTER AND SERVANT, 8.
Erection of schoolhouse, in statute. See SCHOOLS, 2.
First-class interest-bearing real-estate mortgage securities, in will. See TRUSTS, 7.
Holder in due course, in statute. See BILLS AND NOTES, 4.
Impose a tax. See HIGHWAYS AND BRIDGES, 7.
Income, in constitution. See TAXATION, 8, 9.
Indebtedness arising out of the contract, in bond. See PRINCIPAL AND SURETY, 2.
Intention to acquire a new residence, in statute. See ELECTIONS, 5–12.
Legislative power. See CONSTITUTIONAL LAW, 3. HIGHWAYS AND BRIDGES, 6. NAVIGABLE WATERS, 4.
Located between two municipalities, in statute. See HIGHWAYS AND BRIDGES, 3.
Maintain, in statute. See RAILROADS, 3, 4.
More or less, in contract. See VENDOR AND PURCHASER.

WORDS AND PHRASES—con.
Navigable river, in statute. See MILLS AND MILLDAMS, 1.
Obligations, in bond. See PRINCIPAL AND SURETY, 2.
Occupant of land, in statute. See HIGHWAYS, 12.
Other action or proceeding, in statute. See EVIDENCE, 5, 6.
Pay, in deed. See DEEDS, 4.
Payment, in policy. See INSURANCE, 16.
Payment in money, in policy. See INSURANCE, 15.
Poisonous substances, in statute. See POISONS.
Privileges, in contract. See ADOPTION, 3.
Proximate cause. See NEGLIGENCE, 2.
Public use. See MILLS AND MILLDAMS, 3.
Purchase, in statute. See PUBLIC UTILITIES, 2.
Recipient of income, in statute. See TAXATION, 10.
Recovery, in statute. See COSTS, 1.
Remodeling a schoolhouse. See SCHOOLS AND SCHOOL DISTRICTS, 2.
Removal from office, in constitution. See JUDGES, 1.
Residence, in statute. See ELECTIONS, 5–12.
Revert, in will. See WILLS, 8.
Service in connection with transportation, in statute. See CARRIERS, 2.
Shares of the capital stock, in subscription. See CORPORATIONS, 1.
Simple tool. See MASTER AND SERVANT, 10.
Taking for public use. See MILLS AND MILLDAMS, 3.
Temporary purpose, in statute. See ELECTIONS, 5–12.
Transportation, in statute. See CARRIERS, 1, 2.
Uniform system of town and county government, in constitution. See HIGHWAYS AND BRIDGES, 8.
Uniform rule of taxation, in constitution. See HIGHWAYS AND BRIDGES, 10.
Vacancy in office. See TOWNS, 1.
Water mill, in statute. See MILLS AND MILLDAMS, 2.
With or without cause, in contract. See MASTER AND SERVANT, 6.
Work and labor performed and materials furnished, etc., in statute. See MECHANICS' LIENS, 2, 3.

WORKMEN'S COMPENSATION.

Dependency of sister on deceased employee: Evidence.

1. Evidence showing, among other things, that an employee who sustained fatal injuries was on friendly terms with his sister and had, during the period of five months prior to his death, partly paid for care, board, and lodging furnished to her by an uncle, and tending to show that she will probably be able to provide partially for her own needs and that if he had lived he would have continued to contribute to her support, is *held* to sustain a judgment of the circuit court reversing an order of the industrial commission on the ground that she was not wholly, but was partially, dependent on the deceased. *Jackson v. Industrial Comm.* 94

Liability of third person for injury: Assignment of cause of action.

2. A cause of action in tort which an injured employee had against another person and which became the property of his employer under sec. 2394—25, Stats., may be assigned by the employer. *Frankfort General Ins. Co. v. Milwaukee.* 77